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N. 2877

No. 13840

United States
Court of Appeals
for the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation, Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS, Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

HERBERT W. CLARK, Esq.,
RICHARD J. ARCHER, Esq.,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,

11th Floor Crocker Building,
San Francisco 4, California,

JAMES B. ISAACS, Esq.,
DEMPSEY, THAYER, DEIBERT & KUMLER,

1104 Pacific Mutual Building,
Los Angeles 14, California,

For Appellants.

W. R. WALLACE, Jr., Esq.,
MAYNARD GARRISON, Esq.,
JOHN R. PASCOE, Esq.,
WALLACE, GARRISON, NORTON & RAY,

2200 Shell Building,
San Francisco 4, California,

For Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 23171-G

DEFENSE SUPPLIES CORPORATION,
Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, CAPITOL CHEVROLET COMPANY, a corporation, CLYDE W. HENRY, CONSTANTINE PARELLA, V. J. McGREW, CHARLES ELMORE, FIRST DOE COMPANY, a corporation, SECOND DOE COMPANY, a corporation, FIRST DOE and SECOND DOE, Defendants.

DOCKET ENTRIES

1944

Feb. 16—Filed complt. Issued summons.

Mar. 20—Filed ans. of C. Parella.
Warehouse Co.

Apr. 14—Filed Ans of Capitol Chevrolet Co. and x complt.

Apr. 18—Filed ans of C. W. Henry.

Apr. 18—Filed ans of C. Elmore.

Apr. 29—Filed ans of cross-deft Parella to cross-complt.

May 8—Filed aff'dt of service by mail and ans of Lawrence Warehouse Co.

May 12—Filed ans to interrogs propounded to pltff by deft Lawrence Warehouse.

1944

May 17—Filed answer of Cross-deft C. Parella to Cross-Claim of Lawrence Warehouse Co.

May 18—Filed ans of Capitol Chevrolet Co. to cross-complt of Lawrence Warehouse Co.

May 19—Filed ans of x-deft Clyde W. Henry to x-complt of Lawrence Warehouse Co.

May 19—Filed ans of x-deft C. W. Henry to x-complt of Capitol Chevrolet Co.

Nov. 24—Filed no of time and place of trial.

1946

Feb. 20—Ord findgs prepared etc in main case; fur ord hrg on x complts dropped from cal to be restored on mo interested parties.

Apr. 15—Filed Judgt for Pltf $41,975.15 plus costs etc.

June 14—Filed notice of appeal. Mailed No. 6/20.

1949

June 17—Filed mandate of U. S. court of appeals dismissing appeals in this cause.

1951

Mar. 7—Filed substitution of Dempsey, Thayer, Deibert & Kumler as counsel for Capitol Chevrolet Co.

1952

Mar. 3—Filed first amended answer of Capitol Chev. Company to x-claim.

Mar. 4—Filed ord. consolidating with 30473 for trial March 5, 1952 (Goodman).

1952

Mar. 5—Filed motion of Cap. Chev. Company to dism. cross-claim of Lawrence.

Apr. 11—Filed notice by Cap. Chev. Company of motion to strike evidence, April 12, 1952 at 10 a.m.

Sept. 12—Filed ord. for judgment vs. Capitol Chevrolet Company for $68019.15 and costs; vs. James A. Kenyon and Adams Service Co. for said amount in No. 30473; case 30473 dismissed as to Capitol Chevrolet Co. and J.A.K. Co.; Case 30473 vs. Cap. Chev. Company dism. and as to F. Norman Phelps and Alice Phelps dba Adams Service Co. Findings, conclusions and Judgment to be presented (Goodman).

Nov. 21—Filed notice by cross-claimant Lawrence and motion to vacate submission and reopen case for further hearing, Dec. 3, 1952 (In 30473).

Dec. 9—Filed notice and motion by cross-claimant to modify opinion and order for judgment, Dec. 16, 1952, before Judge Goodman.

1953

Jan. 15—Filed ord amending order for judgment. (In case 30473 judgment for $68,019.15 should be against F. Norman Phelps and Alice Phelps as well as James A. Kenyon and Adams Service Co.) Counsel to submit amended findings, conclusions and judgment (Goodman).

1953

Feb. 11—Filed final judgment that Lawrence Warehouse Company recover from Capitol Chevrolet Company on cross-claim $68,294.15 with $7,975.58 interest to date (total $76,269.73); Lawrence Warehouse Company recover from James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps $68,294.15 with $7,975.58 interest to date (total $76,269.73) and costs in 30473-Civ.; that cross-claims of Lawrence Warehouse Company vs. Capitol Chevrolet Company, Capitol Chevrolet Co., and J.A.K. Co. in case 30473 are dismissed and Capitol Chevrolet Company, Capitol Chevrolet Co., and J.A.K. Co. recover costs vs. Lawrence Warehouse Company. (Goodman).

[Title of District Court and Cause No. 23171.]

NOTICE OF TIME AND PLACE OF TRIAL

To Defendant Lawrence Warehouse Company, a Corporation, and to Messrs. Williamson & Wallace, its Attorneys; to Defendant Capitol Chevrolet Company, a Corporation, and to A. J. Getz, Esq., & Cameron B. Aikens, Esq., its Attorneys; to Defendants Clyde W. Henry and Charles Elmore and to Louis J. Glicksberg, Esq., their Attorney; to Defendant Constantine Parella and to Evan J. Hughes, Esq., his Attorney; to Defendant V. J. McGrew and to Albert H. Gommo, Jr., Esq., his Attorney.

You, and each of you, will please take notice hereby given that the above cause has been set for trial in the courtroom of Judge Louis E. Goodman, judge of the above-entitled court, in the Post Office Building, Seventh and Mission Streets, San Francisco, California, for the 13th day of February, 1945, at the hour of 10:00 o'clock a.m.

Dated: November 20, 1944.

/s/ THEODORE R. MEYER,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 24, 1944.

[Title of District Court and Cause No. 23171.]

MANDATE

United States of America—ss.

The President of the United States of America.

To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division, Greeting:

Whereas, lately in the United States District Court for the Northern District of California, Southern Division, before you or some of you, in a cause between Defense Supplies Corporation, plaintiff, and Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, Clyde W. Henry, et al., defendants, No. 23171-G, a Judgment was duly filed and entered on the 15th day of April, 1946, which said Judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof,

And Whereas, the said Lawrence Warehouse Company, Capitol Chevrolet Company, V. J. McGrew, and Defense Supplies Corporation appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 16th day of June, in the year of our Lord, one thousand nine hundred and forty-nine, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and on the mandate of the Supreme Court of the United States herein, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the appeals in this cause be, and hereby are dismissed, with costs in favor of Defense Supplies Corporation and Reconstruction Finance Corporation, and against Lawrence Warehouse Co., Capitol Chevrolet Co., and V. J. McGrew.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred. M. Vinson, Chief Justice of the United States, the sixteenth day of June in the year of our Lord one thousand nine hundred and forty-nine.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

Costs: To Defense Supplies Corp. and Reconstruction Finance Corp. for certiorari: $114.66.

[Endorsed]: Filed June 17, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 23171-G

DEFENSE SUPPLIES CORPORATION,
Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, et al.,
Defendants.

LAWRENCE WAREHOUSE COMPANY, a corporation, Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation,
Cross-Defendants.

FIRST AMENDED ANSWER OF CAPITOL CHEVROLET COMPANY TO CROSS-CLAIM

Comes now cross-defendant Capitol Chevrolet Company, a corporation, and answers the cross-claim of Lawrence Warehouse Company, a corporation, on file herein as follows:

As and for a First Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, cross-defendant Capitol Chevrolet Company avers as follows:

I.

The evidence and pleadings, including the complaint, cross-claim, answers to complaint and an-

swers to cross-claims, have been merged in the judgment rendered by the above-styled Court in the above-entitled action on April 15, 1946.

II.

The evidence and pleadings, including the complaint, cross-claims, answers to complaint and answers to cross-claims, have been merged in the findings of fact and conclusions of law rendered by the above-styled Court in the above-entitled action on April 15, 1946.

As and for a Second Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, cross-defendant Capitol Chevrolet Company admits, denies and avers as follows:

I.

Answering paragraph I, said cross-defendant admits the averments of the first sentence of said paragraph. Said cross-defendant avers that in making the lease referred to in said paragraph cross-defendant Capitol Chevrolet Company acted under the authority and direction of plaintiff and Lawrence Warehouse Company, and only after plaintiff and Lawrence Warehouse Company had inspected and approved the said premises and the fire protection facilities therein and available thereto and approved the same for the storage therein of tires and tubes belonging to plaintiff. Except as in this answering paragraph admitted, said cross-defendant denies the averments of paragraph I.

II.

Answering paragraph II, said cross-defendant avers that if cross-defendants Clyde W. Henry and Constantine Parella by and through their agents, servants and employees, or any other persons, entered into said premises, or any part thereof, at or about the time therein alleged, that said entry was made under and by virtue of the terms of a certain lease made and executed on or about the first day of March, 1943, which provided, among other things, that said cross-defendants Clyde W. Henry and Constantine Parella reserved unto themselves the right to enter upon said premises and to make repairs or alterations therein, and that said provision of said lease was known, consented to, approved, authorized, accepted and assumed by cross-claimant Lawrence Warehouse Company, a corporation, and the plaintiff, Defense Supplies Corporation. Said cross-defendant further avers that said entry was permitted, directed and authorized by cross-claimant Lawrence Warehouse Company. Except as in this answering paragraph admitted, said cross-defendant denies the averments of said paragraph.

III.

Answering paragraph III, said cross-defendant avers that it agreed to and did provide space and storage under the direction and authorization of cross-claimant Lawrence Warehouse Company for certain tires and tubes received from Lawrence Warehouse Company and Defense Supplies Corporation, and that any hazards from fire were known,

consented to, accepted and assumed by Lawrence Warehouse Company and Defense Supplies Corporation. Said cross-defendant further avers that it agreed only to indemnify Lawrence Warehouse Company against loss or damage resulting from a failure on the part of Capitol Chevrolet Company to perform any of its duties under said agency agreement. Except as in this answering paragraph admitted, said cross-defendant denies the averments of paragraph III.

IV.

Answering paragraph IV, said cross-defendant admits that certain tires and tubes were wholly consumed by fire at or about the time and place therein alleged. Except as in this answering paragraph admitted, said cross-defendant denies the averments of said paragraph.

V.

Answering paragraph V, said cross-defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph.

As and for a Third Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

Said cross-defendant avers that at all times mentioned in said cross-claim, Lawrence Warehouse Company and the plaintiff, and each of them, retained and maintained an agent, servant and employee in the capacity of a guard or watchman in

and about the premises described in the cross-claim, and that at all times herein mentioned said guard or watchman was acting within the course and scope of his said agency and employment.

II.

Said cross-defendant avers that at the time and place of the fire described in said cross-claim, said Lawrence Warehouse Company did not itself exercise ordinary care, caution or prudence in the premises to avoid said fire, and that the damages resulting therefrom to plaintiff and cross-claimant, if any there were, were proximately contributed to and caused by the negligence and failure to act of said agent, servant and employee of Lawrence Warehouse Company and plaintiff in that said agent, servant and employee failed to exercise ordinary care, caution and prudence to avoid said fire at the time and place of the happening of said fire and negligently watched, guarded and observed said premises and the activities of the person or persons in or about said premises so as to cause the said fire to commence and to continue unabated thus causing the damage and the whole thereof, if any there were.

As and for a Fourth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

At the time and place of the fire described in the said cross-claim, and prior thereto, Lawrence Ware-

house Company knew, consented to, accepted and did assume all the risks and hazards of said fire.

As and for a Fifth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

All the acts of Capitol Chevrolet Company set forth in the complaint and in said cross-claim in the above-entitled action were pursuant to the agreement described in paragraph III of said cross-claim and were directed and authorized by Lawrence Warehouse Company.

As and for a Sixth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

At no time mentioned in said cross-claim did Capitol Chevrolet Company have any dominion or control over the defendants Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore, or any of the persons or corporations sued herein under fictitious names, and none of said defendants was employed by or a servant or agent of, or authorized to act for said cross-defendant.

II.

The entry of said defendants Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore, and each of them, in, near or upon the

premises described in said cross-claim was under, pursuant and subject to the terms and provisions of that certain lease described in paragraph I of said cross-claim. Said cross-defendant further avers that in the making of said lease Capitol Chevrolet Company acted under the authorization, direction and instructions of Lawrence Warehouse Company, and only after Defense Supplies Corporation and Lawrence Warehouse Company, and each of them, had inspected and approved said premises and the fire protection facilities therein and available thereto and all the terms and provisions of said lease. Said cross-defendant further avers that said entry was authorized and permitted by Lawrence Warehouse Company.

As and for a Seventh Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

In the above-entitled action it has been ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff herein, have and recover from defendants herein Lawrence Warehouse Company, a corporation, and cross-claimant herein, Capitol Chevrolet Company, a corporation, and one of the cross-defendants herein, and V. J. McGrew, jointly and severally, the sum of Forty-one Thousand Nine Hundred Seventy-five and 15/100 Dollars ($41,975.15), together with plaintiff's costs and disbursements in said action.

II.

In the above-entitled action the court has found and concluded that said Lawrence Warehouse Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of goods of plaintiff herein, and that the negligence of defendants in said action, V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together.

As and for an Eighth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

Cross-claimant Lawrence Warehouse Company was equally, jointly and contributorily negligent, or negligent in any of said ways with cross-defendant Capitol Chevrolet Company in causing the damage for which judgment has been rendered in the above-entitled action, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage.

II.

Cross-claimant Lawrence Warehouse Company had knowledge of, acquiesced in, directed, authorized and consented to any negligence, if any there were, of said Capitol Chevrolet Company, which caused or contributed to the cause of the damage for which judgment was rendered in the above-entitled action.

Wherefore, cross-defendant Capitol Chevrolet Company prays that cross-claimant Lawrence Warehouse Company take nothing by this action and that said cross-defendant be awarded its costs of suit herein incurred.

Dated: San Francisco, February 29, 1952.

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK.
Attorneys for Cross-Defendant Capitol Chevrolet Company.

[Endorsed]: Filed March 3, 1952.

[Title of District Court and Causes 23171-30473.]

ORDER FOR CONSOLIDATION

Pursuant to Rule 42 (a) of Federal Rules of Civil Procedure, and in confirmation of minute order heretofore made and entered on January 9, 1952, it is hereby Ordered that the above-captioned actions be consolidated for trial on March 5, 1952.

Dated: March 4th, 1952.

/s/ LOUIS E. GOODMAN,
Judge of the United States District Court.

[Endorsed]: Filed March 4, 1952.

[Title of District Court and Cause No. 23171.]

NOTICE OF MOTION BY CAPITOL CHEVROLET COMPANY TO STRIKE EVIDENCE

To: Lawrence Warehouse Company, a corporation, and W. R. Wallace, Jr., Esq., John R. Pascoe, Esq., and Messrs. Wallace, Garrison, Norton & Ray, its attorneys:

Please take notice that cross-defendant Capitol Chevrolet Company will move the above-styled Court in the courtroom of the Honorable Louis E. Goodman, United States Post-Office and Court House Building, San Francisco, California, on April 21, 1952, at 10:00 a.m. or as soon thereafter as counsel can be heard, for its order striking the following evidence offered by cross-claimant Lawrence Warehouse Company and admitted by the Court over objection of cross-defendant Capitol Chevrolet Company at the trial of the cross-claims of said cross-claimant in the above-entitled action on March 6, 1952:

The transcript of the evidence adduced at the trial of the complaint of Defense Supplies Corporation in the above-entitled action, including the transcript of testimony and exhibits (Tr. of Trials of Cross-Claims, p. 12, lines 3 to 18, inclusive).

This motion will be based on the objections made to such evidence at the time it was offered, the right reserved by the Court, and stipulated to by cross-

claimant, to this moving cross-defendant to move to strike the aforesaid evidence, and the attached Memorandum of Points and Authorities.

Dated: San Francisco, April 11, 1952.

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
Attorneys for Cross-Defendants Capitol Chevrolet Company, et al.

Memorandum of Points and Authorities

I.

The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 was limited, insofar as Capitol Chevrolet Company was concerned, solely to the issue of whether Capitol Chevrolet Company failed to perform some duty owed to Defense Supplies Corporation.

A. The Court made a judicial record on and final determination of this issue by its Judgment of April 15, 1946, and its Findings of Fact and Conclusions of Law of April 15, 1946.

II.

The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be utilized to show that Capitol Chevrolet Com-

pany failed to perform some duty it may have owed to Lawrence Warehouse Company.

A. Evidence in a former trial is admissible against a party only if the party had the right to cross examine on the issue in regard to which the evidence is offered.

Industrial Products Mfg. Co. vs. Jewett, 15 Fed. Rules Serv. 43a.3 Case 1 (S.D. Iowa, 1951);

California Code of Civil Procedure, Sec. 1870 (8);

Werner vs. State Bar, 24 Cal. 2d 611 at 616, 150 P. 2d 892 (1944).

III.

The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be introduced on the issue as to which it was originally offered because on that issue the Court has made a final determination.

A. A judicial record is the "best evidence" of a judicial determination.

Sills vs. Forbes, 33 C.A. 2d 219 at 229, 91 P. 2d 246 (1939); hearing in Supreme Court denied.

B. The evidence adduced at the trial of the complaint of Lawrence Warehouse Company in No. 23171 is "integrated" in a judicial record.

In re Crosby Stores, 65 F. 2d 360 at 361 (2d Cir. 1933).

C. An unambiguous judicial record cannot be modified by extrinsic evidence.

Moore vs. Harjo, 144 F. 2d 318 at 321, et seq. (10th Cir. 1944);

Rothschild & Co. vs. Marshall, 44 F. 2d 546 at 548 (9th Cir. 1930).

D. A judicial record cannot be contradicted by extrinsic evidence that something different was intended.

In re Crosby Stores, 65 F. 2d 360 at 361 (2d Cir. 1933);

Louisiana Land & Exp. Co. vs. Parish of Jefferson, 59 F. Supp. 260 at 266 (E.D. La. 1945).

E. A party who relies on a judicial record cannot impeach its recitals.

Barnsdall Refining Corporation vs. Birnamwood Oil Co., 32 F. Supp. 308 at 313 (E.D. Wis. 1940).

IV.

The evidence offered at the trial of the complaint of Defense Supplies Corporation in No. 23171 is incompetent and inadmissible hearsay where now offered by Lawrence Warehouse Company on the issues raised by the cross-claims and the answers of the cross-defendant.

A. Under California law to use the transcript of testimony at a former trial it is necessary to establish the unavailability of the witnesses whose testimony appears in the transcript.

California Code of Civil Procedure, Sec. 1870 (8);

Gordon vs. Nichols, 86 C.A. 2d 571 at 576, et seq., 195 P. 2d 464 (1948); petition for hearing by Supreme Court denied.

B. Under Federal Law the transcript of testimony given at a former trial is admissible, if at all, only where the unavailability of the witnesses whose testimony appears in the transcript is established.

Rule 43(a), Federal Rules Civil Procedure;
Salt Lake City vs. Smith, 104 Fed. 457 at 468, et seq. (8th Cir. 1900);
Toledo Traction Co. vs. Cameron, 137 Fed. 48 at 57 et seq. (6th Cir. 1905);
Great Northern Ry. Co. vs. Ennis, 236 Fed. 17 at 25 et seq. (9th Cir. 1916);
United States vs. Aluminum Co. of America, 1 F.R.D. 48 at 50 (S.D. N.Y. 1938);
In re Robinson, 42 F. Supp. 342 at 345 (D. Mass. 1941).

V.

At the trial of the cross-claim of Lawrence Warehouse Company against the cross-defendant Capitol Chevrolet Company the Court reserved to cross-defendant the right to make the foregoing motion to strike evidence and the cross-claimant stipulated to such reservation.

Transcript of Trials of Cross Claims, page 12, lines 3-15; page 17, line 2, to page 18, line 2; page 19, lines 7-16.

[Endorsed]: Filed April 11, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 23171

[Title of Cause.]

No. 30473

RECONSTRUCTION FINANCE CORPORATION, Plaintiff,

vs.

CAPITOL CHEVROLET COMPANY a corporation, et al., Defendants.

ORDER FOR JUDGMENT

Early in 1943, the Defense Supplies Corporation, an agency of the United States, contracted with Lawrence Warehouse Company, (hereinafter referred to as Lawrence) to store a quantity of automobile tires and tubes. Lawrence in turn contracted with the Capitol Chevrolet Company (hereinafter referred to as Capitol) to warehouse these tires and tubes as its agent. Capitol stored the tires and tubes in a warehouse leased from Clyde W. Henry. On April 9, 1943, the warehouse along with all the tires and tubes, was destroyed by a fire which started while one V. J. McGrew was operating an acetylene torch in the engine room of the warehouse.

On February 16, 1944, Defense Supplies Corporation commenced an action against Lawrence, Capitol, Henry, and McGrew to recover damages for the loss of the tires and tubes. Pursuant to Rule 13, F.R.C.P., on May 8, 1944, Lawrence cross-com-

plained against Capitol and Henry, alleging their liability for any judgment obtained against it. Capitol likewise cross-complained against Henry.

At the trial, it appeared that the defendant Capitol Chevrolet Company, a corporation had been dissolved on June 5, 1944, all of its assets having been distributed on December 31, 1943, to its stockholders James A. Kenyon, and Adams Service Co., a corporation wholly owned by F. Norman Phelps and Alice Phelps. The former stockholders had carried on the business of the Capitol Chevrolet Company as a limited partnership, and had expressly agreed to assume its liabilities. They were not named as defendants, but actively assumed the defense of the action in behalf of the Capitol Chevrolet Company.

At the conclusion of the plaintiff's case, counsel for all the defendants stated that no evidence would be presented in their behalf, and moved to dismiss the action and for judgment in their favor. The cause was submitted upon the motions to dismiss. Counsel for Lawrence, Capitol, and Henry agreed that the trial of the cross-complaints should await the final determination of the plaintiff's cause, a procedure sanctioned by Rule 54(b).

On January 9, 1946, the Court filed an opinion, 67 F. Supp. 16, and order for judgment in favor of plaintiff Defense Supplies Corporation and against Lawrence, Capitol, and McGrew. Henry was found to be free from negligence and liability. The Court stated in its opinion that the fire was caused by McGrew's negligent operation of the acet-

ylene torch, and that Capitol was also negligent in permitting McGrew to enter the premises without ascertaining his intentions and in failing to maintain proper safeguards against fire. The negligence of Capitol, the Court stated, was imputable to its principal Lawrence.

In Findings filed April 14, 1946, the Court found that "defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire." The Court further found that "the negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's Goods, as aforesaid," and that "by reason of said negligent acts of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15." A joint and several judgment against the defendants

Lawrence, Capitol, and McGrew was entered in favor of Defense Supplies Corporation for $41,-975.15 plus costs of $186.55.

This judgment was affirmed on appeal on December 5, 1947, 164 F.2d 773. Subsequently, defendants moved the Court of Appeals to vacate the affirmance and to remand the cause to this court with instructions to dismiss. The ground of the motion was that the Defense Supplies Corporation had been dissolved on June 30, 1945, and, hence, when this Court had entered the judgment on April 14, 1946, it had lost its jurisdiction. This motion was granted by the Court of Appeals, 168 F.2d 199. On certiorari, the Supreme Court held that, while the appeal from the judgment of this court had abated on July 2, 1946, the judgment was valid when entered, and could be sued upon by the successor of the Defense Supplies Corporation, the Reconstruction Finance Corporation, 336 U. S. 631.

On April 12, 1951, Reconstruction Finance Corporation brought suit on the judgment in favor of Defense Supplies Corporation. In that action, No. 30473, Lawrence cross-complained both against the old Capitol Chevrolet Company, which had been dissolved on June 5, 1944, and against its stockholders James A. Kenyon and Adams Service Co., who had, upon its dissolution, acquired its assets, assumed its liabilities, and carried on its business as a limited partnership. Lawrence also cross-complained against a new corporation, Capitol Chevrolet Co., organized April 10, 1946, to succeed the limited partnership, and against certain stockhold-

ers of this corporation, namely, the J. A. K. Co., a corporation, and F. Norman Phelps and Alice Phelps. On November 20, 1951, the Court entered final judgment in favor of Reconstruction Finance Corporation for $42,171.70, plus costs of $20.00 and 7% interest from April 15, 1946, against Capitol, Lawrence and McGrew. This judgment was entered without prejudice to the further prosecution by Lawrence of its cross-claims. Lawrence paid the entire judgment of $58,859.90 on December 1, 1951.

On January 9, 1952, the Court ordered the cross-claims of Lawrence in the original action No. 23171 and in No. 30473 consolidated for trial. At the trial on March 6, 1952, Lawrence rested its case on the evidence previously presented by Defense Supplies Corporation. One witness testified in behalf of the cross-defendants.

In the opinion of the Court, the evidence in the record sustains the conclusion that Capitol is liable to its principal Lawrence for the loss incurred by Lawrence as a result of the negligent acts of Capitol. The liability of Capitol rests both on its breach of duty as an agent and its express agreement "to indemnify the principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations" assumed. Among the duties undertaken by Capitol was "to store and safeguard the storage of such tires and tubes" as were received by Capitol. This conclusion is not precluded by the references, in the findings previously made by the Court in this cause, to the negligence of Lawrence. These findings in no way

denoted that the negligence of Lawrence, there referred to, was anything more than negligence imputed to Lawrence as the principal of Capitol.

The contention of Capitol, that the evidence introduced by Defense Supplies Corporation upon the trial of its complaint, cannot be considered in determining the cross-complaint, is without merit, inasmuch as the trial of the cross-complaint is but another phase of the same action. Capitol's contention is not supported by the authorities cited. Nor are any other of the special defenses sustained.

The action, No. 23171, against Capitol, not having abated by Capitol's dissolution, Calif. Corporation Code §5401, judgment may enter against the Capitol Chevrolet Company for $68,019.15, plus the court costs of prosecuting the cross-complaint.

James A. Kenyon and Adams Service Co. having actively participated in the defense of Capitol Chevrolet Company in No. 23171, the judgment in that action is res judicata as to them. Inasmuch as they assumed the liabilities of Capitol Chevrolet Company upon its dissolution, they are liable for the amount of the judgment against Capitol. Judgment may therefore go in No. 30473 against James A. Kenyon and Adams Service Co. for $68,-019.15, plus the court costs of prosecuting the cross-complaint.

There is no evidence that the Capitol Chevrolet Co., which succeeded the limited partnership, assumed any of the liabilities of the old Capitol Chevrolet Company, or of the partnership or its members. The cause of action in No. 30473 against the

Capitol Chevrolet Co. is therefore dismissed. The J. A. K. Co., being merely a stockholder of the Capitol Chevrolet Co., the action against it, is also dismissed.

The Capitol Chevrolet Company having been long since dissolved when the cross-complaint in No. 30473 was filed, that action against it is dismissed. The evidence is inconclusive as to whether F. Norman Phelps and Alice Phelps might be treated as the alter ego of the Adams Service Co. The action against them is therefore dismissed.

Present Findings pursuant to the Rules.

Dated: September 8th, 1952.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 12, 1952.

[Title of District Court and Causes 23171-30473.]

ORDER AMENDING ORDER FOR JUDGMENT

On September 12, 1952, the court filed herein its order for judgment. On page 6, in the last paragraph thereof, the court stated: "The evidence is inconclusive as to whether F. Norman Phelps and Alice Phelps might be treated as the alter ego of the Adams Service Co. The action against them is therefore dismissed." Subsequently, cross complainant Lawrence Warehouse Company moved the court for an order vacating the submission of the

case and to reopen the same for further hearing upon the question of the liability of the defendants F. Norman Phelps and Alice Phelps. This motion has been argued and submitted to the court. As well, proposed findings of fact and conclusions of law and proposed amendments thereto have been submitted by the parties.

Upon further consideration, the court is of the opinion that, in action 30473, judgment for $68,-019.15 should go against the defendants F. Norman Phelps and Alice Phelps as well as against the defendants James A. Keynon and Adams Service Co.

In the opening brief upon submission of the cause, cross complainant Lawrence Warehouse Co. contended that judgment should go against the two Phelps as well as against the Adams Service Co. on the ground that the Phelps were the alter ego of the Adams Service Co. In the reply brief filed on behalf of all the cross defendants, counsel stated on page 23 thereof, after arguing against the liability of the Adams Service Co.: "It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Company is liable." In the reply memorandum of cross complainant Lawrence Warehouse Co. no further mention was made of this subject.

Upon re-examination of the depositions of F. Norman Phelps and Alice Phelps, the interrogatories and answers thereto, and the record and files in the case, it now appears to the court that no issue was ever raised by defendants as to any

distinction in liability as between Adams Service Co. and the two Phelps. The reason for this is obvious. The evidence shows that Adams Service Co., while clothed in the formal habiliments of a corporation, actually never functioned as such. It is reasonably inferable from the testimony of Phelps that the Adams Service Co. was a mere formality designed to benefit the Phelps taxwise. When the assets of the Adams Service Co. were transferred to the new Capitol Chevrolet Company, stock of the latter company given in payment thereof, was issued directly to the two Phelps. It thus appears that the two Phelps actually dealt with the property of the Adams Service Co. as if it were their own in every respect. As to the Phelps' liability, it is evident from the record that they themselves and their counsel never made any distinction as between the Adams Service Co. and the Phelps in the event of any court decree determining liability on the part of the Adams Service Co. In this posture of the record, it would be manifestly unjust, since the court has decided that Adams Service Co. is liable, if the judgment did not as well run against the two Phelps individually.

It is ordered that counsel submit amended findings of fact and conclusions of law accordingly.

Dated: January 15, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Jan. 15, 1953.

[Title of District Court and Cause No. 23171.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Capitol Chevrolet Company, named above as a cross-defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in this action dated February 11, 1953, and entered on February 12, 1953.

Dated: San Francisco, March 10, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
Attorneys for Appellant, Capitol Chevrolet Company.

[Endorsed]: Filed March 10, 1953.

[Title of District Court and Cause No. 23171.]

DESIGNATION BY CAPITOL CHEVROLET COMPANY OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellant designates the following portions of the record to be contained in the record on appeal in the above-entitled action to the United States Court of Appeals for the Ninth Circuit:

1. The complete record and all the proceedings and evidence (including all the exhibits) in the action, including but not limited to the following:

(a) The complaint of Defense Supplies Corporation;

(b) Answer of defendant Capitol Chevrolet Company and cross-claim against certain defendants;

(c) Answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants;

(d) Answer of Capitol Chevrolet Company to cross-complaint of Lawrence Warehouse Company;

(e) Answer of cross-defendant Constantine Parella to cross-complaint of Lawrence Warehouse Company;

(f) Answer of cross-defendant Constantine Parella to cross-complaint of Capitol Chevrolet Company;

(g) Answer of cross-defendant Clyde W. Henry to cross-complaint of Lawrence Warehouse Company;

(h) Answer of cross-defendant Clyde W. Henry to cross-complaint of Lawrence Warehouse Company;

(i) The minute order dated February 20, 1946 (Civil Minutes Vol. 56);

(j) Findings of fact and conclusions of law dated April 15, 1946;

(k) Judgment dated April 15, 1946;

(l) The mandate of the Court of Appeals;

(m) First amended answer of Capitol Chevrolet Company to cross-claim;

(n) Notice of motion by Capitol Chevrolet Company to strike evidence, filed April 11, 1952;

(o) Findings of fact and conclusions of law dated February 11, 1953;

(p) Judgment dated February 11, 1953;

(q) The transcript of testimony, appearances and all the evidence and exhibits introduced at the trial which commenced on February 13, 1945, and ended February 15, 1945;

(r) The order for consolidation filed March 4, 1952;

(s) The transcript of testimony, appearances and all the evidence and exhibits introduced at the trial on March 5, 1952;

(t) The motion to set for trial and the notice of trial for the trial which commenced on February 13, 1945, and ended February 15, 1945;

(u) All the docket entries in the above-entitled action;

(v) The notice of appeal filed by Capitol Chevrolet Company;

(w) This designation of portions of record, proceedings and evidence.

Dated: San Francisco, March 12, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant Capitol Chevrolet Company.

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1953.

[Title of District Court and Cause No. 30473.]

DOCKET ENTRIES

1951

Apr. 12—Filed complaint-issued 2 summons. (1 No. Dist. Calif.—1 So. Dist. Calif.)

May 5—Filed answer of Capitol Chevrolet Co.

May 28—Filed answer of James A. Kenyon.

June 15—Filed answer and cross claim of Seaboard Surety Co.

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June 27—Filed answer of Lawrence Warehouse Co. to cross-claim of Seaboard Surety Co.

June 29—Filed answer of Capitol Chev. Company.

July 17—Filed answer of cross deft. Capitol Chev. Company.

July 17—Filed answer of cross deft. James A. Kenyon.

Nov. 20—Filed judgment for plaintiffs vs. Lawrence Warehouse Co., Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, jointly and severally, in sum $42,171.70 with 7% interest from April 15, 1946, and costs. Execution to issue after Dec. 1, 1951. (Goodman).

Nov. 21—Entered judgment. Mailed notices.

Dec. 7 — Filed notice by Lawrence Warehouse Company of Payment of judgment and claim to contribution or repayment.

Dec. 7—Filed assignment of judgment by Reconstruction Finance Co. to Lawrence Warehouse Co.

[Title of District Court and Cause No. 30473.]

COMPLAINT ON JUDGMENT

Plaintiff complains of defendants and each of them and for cause of action alleges:

I.

This is a civil action; the amount in controversy exceeds $3,000 exclusive of interest and costs; the jurisdiction of this Court is conferred by reason of the amount in controversy and as arising under a law of the United States, the Government of the United States being the owner and holder of more than one-half of the capitol stock of the plaintiff, Reconstruction Finance Corporation.

II.

At all times herein mentioned plaintiff was and now is a federal corporation created by and organized under an Act of Congress of the United States, to wit: "Reconstruction Finance Corporation Act" (Act of January 22, 1932, Chapter VIII, 47 Statutes at Large, page 5, Title 15 U.S.C.A., para. 601-607, inclusive), as amended and supplemented, and derives its existence, faculties and powers therefrom and that all of its capital stock and assets are wholly owned by the Government of the United States of America; that said Reconstruction Finance Corporation is an agency, arm and instrumentality of the United States of America for carrying out the purposes and objects of its incorporation by the Congress, and has been

at all times since its creation engaged solely in carrying out such purposes and objects and has the power to contract and be contracted with, sue and be sued in its corporate name as such, to acquire property and property rights and to exercise ownership of and to protect the property and property rights so acquired and hereinafter referred to as well as to enforce the rights vested in it and by virtue of such law of the United States and more particularly the rights hereinafter set forth.

III.

Defendant Lawrence Warehouse Company is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

IV.

Defendant Capitol Chevrolet Company at all times mentioned herein and until on or about June 5, 1944 was a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Sacramento, County of Sacramento, State of California.

V.

Defendant Capitol Chevrolet Co. is now and ever since on or about the 10th day of April, 1946, has been a corporation duly organized and existing un-

der and by virtue of the laws of the State of California, having its principal place of business in the City of Sacramento, County of Sacramento, State of California.

VI.

Defendant Seaboard Surety Company, a corporation, is now and at all times mentioned herein has been a corporation duly organized and existing under and by virtue of the laws of the State of New York and authorized to transact and doing a general surety business in the State of California and having a place of business in the City and County of San Francisco, State of California.

VII.

On or about April 15, 1946, in the above-entitled District Court of the United States of America, Northern District of California, Southern Division, a judgment was duly given, rendered and made by said court in favor of Defense Supplies Corporation, the plaintiff, and against the above-named defendants, Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, and each of them, in an action filed on February 16, 1944, and then pending in said court and numbered 23171-G in the Records of said court, wherein said Defense Supplies Corporation was plaintiff and said Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew were defendants for the principal sum of $41,975.15, together with costs in the sum of $196.55, said sums aggregating the

total sum of $42,171.70 and which said last mentioned sum bears interest from the date of said judgment until paid at the rate of seven per cent per annum.

VIII.

On or about June 12, 1946, the defendant Seaboard Surety Company made its undertaking on appeal (Bond No. RSF-422) in said action for the principal sum of $45,000 in favor of Defense Supplies Corporation; said undertaking on appeal was filed on June 14, 1946, in said action on behalf of defendant Lawrence Warehouse Company; said undertaking provided that if the said Lawrence Warehouse Company, as appellant in said action, failed to pay the amount of such judgment as might be affirmed against the said appellant, within 30 days after the filing of the remittitur from the Appellate Court, then judgment could be entered in said action on the motion of Defense Supplies Corporation, as respondent, without notice to the surety in favor of Defense Supplies Corporation and against the surety for the amount of such judgment, together with interest and the damages and costs awarded against the said appellant upon appeal.

IX.

On or about June 16, 1949, judgment was entered by the United States Court of Appeals in said action dismissing the appeals which had been taken therein by the defendants Capitol Chevrolet Company, a corporation, and Lawrence Warehouse Company, a corporation, and said judgment in said

action in favor of Defense Supplies Corporation thereupon became final.

X.

Nothing has been paid on account of the principal or interest on said judgment and there now remains due, owing and unpaid on said judgment the principal sum of $42,171.70, together with interest thereon at seven per cent per annum from April 15, 1946 until paid.

XI.

By joint resolution of the Congress of the United States on June 30, 1945 (c. 215, Public Law 109, 59 Statutes 310) all functions, powers, duties and authority of said Defense Supplies Corporation were transferred, together with all of its documents, books of account, records, assets and liabilities of every kind and nature, to plaintiff Reconstruction Finance Corporation.

XII.

Plaintiff Reconstruction Finance Corporation is now the owner of said judgment and of all rights of Defense Supplies Corporation thereunder and is entitled to bring this action thereon by reason of said joint resolution of the Congress and by reason of the decision of the Supreme Court of the United States on April 18, 1949 (336 U.S. 631, 93 Law. Ed. 931, rehearing denied May 31, 1949) on certiorari to the United States Court of Appeals for the Ninth Circuit in the said case in which said judgment was made and entered.

XIII.

Plaintiff is informed and believes and therefore alleges that on or about June 5, 1944, the defendant corporation Capitol Chevrolet Company was dissolved and all of its assets and properties transferred to the defendant James A. Kenyon and that said defendant James A. Kenyon in consideration of the transfer to him of the properties and assets of the said corporation assumed and agreed to pay all of the liabilities of said corporation, including the liability of said defendant corporation to Defense Supplies Corporation; that thereafter and on or about April 10, 1946, said defendant James A. Kenyon caused to be incorporated the defendant corporation Capitol Chevrolet Co. and transferred to said defendant Capitol Chevrolet Co. all or part of the properties and assets which defendant James A. Kenyon had received upon dissolution of Capitol Chevrolet Company, and that said defendant Capitol Chevrolet Co. received and accepted the transfer of the property and assets from the defendant James A. Kenyon and then and there and in consideration thereof assumed and agreed to pay the liabilities of said defendant Capitol Chevrolet Company and the liabilities of said defendant James A. Kenyon, including the liability of said defendant Capitol Chevrolet Company and defendant James A. Kenyon to Defense Supplies Corporation.

XIV.

Said judgment has not been vacated, set aside or reversed, the appeals taken therefrom have been

dismissed, motions for a new trial have been denied, and said judgment is in all respects final and is now in full force and effect.

Wherefore, plaintiff Reconstruction Finance Corporation prays judgment against said defendants Capitol Chevrolet Company, a corporation, Lawrence Warehouse Company, a corporation, James A. Kenyon, Capitol Chevrolet Co., a corporation, V. J. McGrew, and Seaboard Surety Company, a corporation, and each of them, as follows:

1. For the principal sum of $42,171.70, together with interest thereon from April 15, 1946 until paid at the rate of seven per cent per annum.

2. For its costs of suit herein incurred.

3. For such other and further relief as is meet and proper in the premises.

/s/ R. L. MILLER,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF DEFENDANT CAPITOL CHEVROLET CO., A CORPORATION

For answer to the complaint of the plaintiff in the above-entitled cause, defendant Capitol Chevrolet Co. says:

I.

Answering paragraph I of the complaint, defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint, defendant admits the allegations therein contained.

III.

Answering paragraph III of the complaint, defendant admits the allegations therein contained.

IV.

Answering paragraph IV of the complaint, defendant denies the allegations therein contained.

V.

Answering paragraph V of the complaint, defendant admits the allegations therein contained.

VI.

Answering paragraph VI of the complaint, defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore denies the allegation of said paragraph.

VII.

Answering paragraph VII of the complaint, defendant admits the allegations therein contained.

VIII.

Answering paragraph VIII of the complaint, defendant admits the allegations therein contained.

IX.

Answering paragraph IX of the complaint, defendant specifically denies each and every allegation therein contained.

X.

Answering paragraph X of the complaint, defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore denies the allegations of said paragraph.

XI.

Answering paragraph XI of the complaint, defendant admits the allegations therein contained.

XII.

Answering paragraph XII of the complaint, defendant specifically denies each and every allegation therein contained.

XIII.

Answering paragraph XIII of the complaint, defendant specifically denies each and every allegation therein contained.

XIV.

Answering paragraph XIV of the complaint, defendant admits the allegations therein contained.

XV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

I.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action and is therefore barred under Section 337 of the Code of Civil Procedure of the State of California.

Third Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action and is therefore barred under Section 343 of the Code of Civil Procedure of the State of California.

Fourth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore

barred under Section 338 of the Code of Civil Procedure of the State of California.

Fifth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore barred under Section 359 of the Code of Civil Procedure of the State of California.

Sixth Separate and Distinct Defense.

I.

That all and every matters stated in the complaint are matters which may be tried and determined at law and with respect to which plaintiff is not entitled to any relief from a court of equity, as it has a complete and adequate remedy at law by judgment against the original parties to the judgment who are jointly and severally liable thereon and execution against said defendants since one or more of them is financially solvent and able to satisfy such judgment.

Seventh Separate and Distinct Defense.

I.

Plaintiff, with full knowledge of all the facts, did not commence any proceedings to recover from defendant until the institution of this suit and defendant therefore says that plaintiff has been guilty of laches.

Wherefore, defendant Capitol Chevrolet Co. prays judgment:

1. That the complaint of the plaintiff be dismissed as to this defendant.

2. That the defendant be granted such other and further relief as to the Court may seem meet and proper.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL S. PATTERSON

/s/ By H. C. ALPHSON,

Attorneys for Defendant, Capitol Chevrolet Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF DEFENDANT JAMES A. KENYON

For answer to the complaint of the plaintiff in the above-entitled cause, defendant James A. Kenyon says:

I.

Answering paragraph I of the complaint, defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint, defendant admits the allegations therein contained.

III.

Answering paragraph III of the complaint, defendant admits the allegations therein contained.

IV.

Answering paragraph IV of the complaint, defendant denies the allegations therein contained.

V.

Answering paragraph V of the complaint, defendant admits the allegations therein contained.

VI.

Answering paragraph VI of the complaint, defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore denies the allegation of said paragraph.

VII.

Answering paragraph VII of the complaint, defendant admits the allegations therein contained.

VIII.

Answering paragraph VIII of the complaint, defendant admits the allegations therein contained.

IX.

Answering paragraph IX of the complaint, defendant specifically denies each and every allegation therein contained.

X.

Answering paragraph X of the complaint, defendant denies that he has any knowledge or information sufficient to form a belief as to allega-

tions therein contained and therefore denies the allegations of said paragraph.

XI.

Answering paragraph XI of the complaint, defendant admits the allegations therein contained.

XII.

Answering paragraph XII of the complaint, defendant specifically denies each and every allegation therein contained.

XIII.

Answering paragraph XIII of the complaint, defendant specifically denies each and every allegation therein contained.

XIV.

Answering paragraph XIV of the complaint, defendant admits the allegations therein contained.

XV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

I.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the com-

mencement of this action and is therefore barred under Section 337 of the Code of Civil Procedure of the State of California.

Third Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action and is therefore barred under Section 343 of the Code of Civil Procedure of the State of California.

Fourth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore barred under Section 338 of the Code of Civil Procedure of the State of California.

Fifth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore barred under Section 359 of the Code of Civil Procedure of the State of California.

Sixth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within two years next before the com-

mencement of this action and is therefore barred under Section 339 of the Code of Civil Procedure of the State of California.

Seventh Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within six months next before the commencement of this action and is therefore barred under Section 341 of the Code of Civil Procedure of the State of California.

Eighth Separate and Distinct Defense.

I.

That all and every matters stated in the complaint are matters which may be tried and determined at law and with respect to which plaintiff is not entitled to any relief from a court of equity, as it has a complete and adequate remedy at law by judgment against the original parties to the judgment and execution against said defendants since one or more of them is financially solvent and able to satisfy such judgment or by proceedings supplementary to execution.

Ninth Separate and Distinct Defense.

I.

Plaintiff, with full knowledge of all the facts, did not commence any proceedings to recover from defendant until the institution of this suit and defendant therefore says that plaintiff has been guilty of laches.

Wherefore, defendant James A. Kenyon prays judgment:

1. That the complaint of the plaintiff be dismissed as to this defendant.

2. That the defendant be granted such other and further relief as to the Court may seem meet and proper.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL S. PATTERSON

/s/ By H. C. ALPHSON,

Attorneys for Defendant James A. Kenyon.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 28, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF DEFENDANT LAWRENCE WAREHOUSE COMPANY AND CROSS-CLAIM AGAINST CERTAIN DEFENDANTS.

Comes now defendant Lawrence Warehouse Company, a corporation, and for answer to the complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I to XIV, inclusive.

And by way of a second, separate and further defense defendant alleges:

I.

Repeats and re-alleges the allegations contained in Paragraph I of its Answer as if the same were herein set out in full.

II.

Plaintiff, with full knowledge of all the facts, did not commence any proceedings to recover upon said judgment from June 16, 1949, until the commencement of this action on April 12, 1951, and is, therefore, guilty of laches.

And by way of cross-claim against defendants and cross-defendants Capitol Chevrolet Company, a corporation, James A. Kenyon, Capitol Chevrolet Co., a corporation, this defendant and cross-claimant alleges as follows:

I.

Cross-claimant Lawrence Warehouse Company is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

II.

Cross-defendant Capitol Chevrolet Company at all times mentioned herein and until on or about June 5, 1944, was a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of

business in the City of Sacramento, County of Sacramento, State of California.

III.

Cross-defendant Capitol Chevrolet Co. is now and ever since on or about the 10th day of April, 1946, has been a corporation duly organized and existing under and by virtue of the laws of the State of California, havings its principal place of business in the City of Sacramento, County of Sacramento, State of California.

IV.

On or about April 15, 1946, in the above-entitled District Court of the United States of America, Northern District of California, Southern Division, in an action filed on February 16, 1944, and then pending in said Court and numbered 23171-G in the Records of said Court, wherein Defense Supplies Corporation was plaintiff and cross-claimant Lawrence Warehouse Company, cross-defendant Capitol Chevrolet Company and V. J. McGrew were defendants, a judgment was duly given, rendered and made by said Court in favor of said Defense Supplies Corporation and against cross-claimant, cross-defendant Capitol Chevrolet Company, and said V. J. McGrew, and each of them, for the principal sum of $41,975.15, together with costs in the sum of $196.55, said sums aggregating the total sum of $42,171.70, with interest thereon from the date of said judgment until paid at the rate of seven percent per annum. On or about June 16, 1949, judgment was entered by the United States

Court of Appeals in said action dismissing the appeals which had been taken therein by cross-defendant Capitol Chevrolet Company and by cross-claimant, and said judgment in said action in favor of Defense Supplies Corporation thereupon became final. Said judgment has not been vacated, set aside or reversed, the appeals taken therefrom have been dismissed, motions for a new trial have been denied, and said judgment is in all respects final and is now in full force and effect.

V.

The said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant as principal for and because of the negligence of cross-defendant Capitol Chevrolet Company, the agent of cross-claimant, and for no other reason. Cross-claimant is entitled to recover any sums paid by it under said judgment from cross-defendant Capitol Chevrolet Company by virtue of the relationship existing between them. Cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-claimant is entitled to recover said sums from cross-defendant Capitol Chevrolet Company by virtue of the relationship existing between them.

VI.

Cross-claimant is informed and believes and therefore alleges that on or about June 5, 1944,

cross defendant Capitol Chevrolet Company was dissolved and all of its assets and properties transferred to cross-defendant James A. Kenyon, and that said cross-defendant James A. Kenyon in consideration of the transfer to him of the properties and assets of the said corporation assumed and agreed to pay all of the liabilities of said corporation, including the said liability of said cross-defendant to cross-claimant; that thereafter and on or about April 10, 1946, said cross-defendant James A. Kenyon caused to be incorporated cross-defendant Capitol Chevrolet Co. and transferred to said cross-defendant Capitol Chevrolet Co. all or part of the properties and assets which cross-defendant James A. Kenyon had received upon dissolution of cross-defendant Capitol Chevrolet Company, and that said cross-defendant Capitol Chevrolet Co. received and accepted the transfer of the property and assets from cross-defendant James A. Kenyon and then and there and in consideration thereof assumed and agreed to pay the liabilities of said cross-defendant Capitol Chevrolet Company and the liabilities of said cross-defendant James A. Kenyon, including the said liability of said cross-defendant Capitol Chevrolet Company and cross-defendant James A. Kenyon to cross-claimant.

VII.

This action was brought by Reconstruction Finance Corporation upon the judgment in favor of Defense Supplies Corporation referred to in Paragraph IV above, upon the ground that Reconstruc-

tion Finance Corporation is now the owner of said judgment by reason of a joint resolution of the Congress of the United States on June 30, 1945 (c. 215, Public Law 109, 59 Stats. 310) and by reason of the decision of the Supreme Court of the United States regarding said judgment (336 U.S. 631, 93 L. ed. 931). If judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, cross-claimant is entitled to judgment against cross-defendants, and each of them, for the amount of said judgment and for its costs, expenses and attorneys' fees incurred in defending the action referred to in Paragraph IV above and in this action. The amount of said costs, expenses and attorneys' fees which cross-claimant will incur in defending this action are at present unknown to cross-claimant, and cross-claimant prays leave to amend this cross-claim to include said sums when the same shall be ascertained.

And for a second, separate and further cross-claim against defendants and cross-defendants Capitol Chevrolet Company, a corporation, James A. Kenyon, and Capitol Chevrolet Co., a corporation, this defendant and cross-claimant alleges:

I.

Cross-claimant repleads all of the allegations contained in Paragraphs I, II, III and IV of its first cross-claim, to which reference is hereby made, and the same are hereby incorporated in this second

cross-claim and made a part hereof as though set forth in full.

II.

On or about October 1, 1942, cross-claimant entered into a written contract with cross-defendant Capitol Chevrolet Company, a copy of which said agreement is attached hereto, marked Exhibit "A" and made a part hereof as though fully set forth herein.

III.

That said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant solely because of the failure on the part of cross-defendant Capitol Chevrolet Company to perform its duties and obligations under the said written contract between said cross-defendant and cross-claimant, and for no other reason. Cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs, and out-of-pocket expenses in defending this action. Cross-defendant Capitol Chevrolet Company agreed in said written contract to idemnify cross-claimant against loss or damage resulting from a failure on the part of said cross-defendant to perform any of the duties and obligations set forth in said contract.

IV.

Cross-claimant repleads all of the allegations contained in Paragraphs VI and VII of its first cross-claim, to which reference is hereby made, and the

same are incorporated in this second cross-claim and made a part hereof as though set forth in full.

Wherefore, defendant and cross-claimant Lawrence Warehouse Company prays judgment that plaintiff take nothing by reason of its said complaint and that defendant be dismissed hence with its costs of suit incurred herein.

Defendant and cross-claimant Lawrence Warehouse Company further prays judgment against defendants and cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co., and each of them, for the sum of $8,835.44, and for such costs, expenses and attorneys' fees as it may incur in this action; and

If judgment shall be entered in this action in favor of plaintiff and against defendant Lawrence Warehouse Company, that this defendant as cross-claimant may have and recover judgment against cross-defendants Capitol Chevrolet Company, James A. Kenyon, and Capitol Chevrolet Co., for the amount of any judgment which may be rendered in this action against defendant Lawrence Warehouse Company, together with interest that may accrue upon said judgment until the same is paid; and for costs of suit and such other and further relief as may be proper in the premises.

/s/ W. R. WALLACE, JR.
/s/ JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
Attorneys for defendant and cross-claimant Lawrence Warehouse Company.

State of California,
City and County of San Francisco—ss.

Louis A. Benoist, being first duly sworn, deposes and says: That he is an officer, to-wit, President of Lawrence Warehouse Company, a corporation, one of the defendants and the cross-claimant in the above entitled action; and as such is authorized to make this verification on its behalf; that he has read the foregoing Answer and Cross-Claim against Certain defendants and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, he believes it to be true.

/s/ LOUIS A. BENOIST

Subscribed and sworn to before me this 5th day of June, 1951.

[Seal] /s/ SELMA R. CONLAN,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires July 5, 1953.

Acknowledgment of Service attached.

EXHIBIT "A"

AGENCY AGREEMENT WITH GOVERNMENT CUSTODIAN

This Agency Agreement dated October 1st, 1942, between Lawrence Warehouse Company, a California corporation, acting as custodian for govern-

mental agencies, and Capitol Chevrolet Company (Name and status, i.e., individual, partnership, corporation, etc.) of....., in the County of....., State of.....

Capitol Chevrolet Company, (hereinafter called Agent) agrees with Lawrence Warehouse Company, acting as custodian for governmental agencies and hereinafter called Principal.

1. To furnish suitable storage space for the storage of such tires and tubes as may be delivered to Agent to the total of available capacity of Agent.

2. To receive such tires and tubes as may be delivered to Agent for the account of Lawrence Warehouse Company as custodian for the Defense Supplies Corporation, or any other governmental agency.

3. To store and safeguard the storage of such tires and tubes as are received by Agent. To keep such tires and tubes separate and apart from any other merchandise whatsoever and to place upon such tires and tubes such evidence of ownership, custodianship, purchase, date of deposit and other information as may be required by the Principal.

4. To issue a receipt evidencing the deposit of such tires and tubes in such form as may be approved by the Principal, and to maintain such records as may be necessary in the opinion of the Principal.

5. To release tires and tubes in possession of Agent only upon instructions from the Principal.

6. To place such distinguishing signs as may be delivered to Agent within the area in which the

tires and tubes are stored to indicate possession by the Principal of the tires and tubes as custodian for the governmental agency or agencies and to indicate ownership by the Government of the United States.

7. To agree that he will at his own cost and expense keep said demised premises in good order and repair, and that the Principal shall not be called upon or required to make any repairs of any kind or nature to, in or about said demised premises. Further, should the Agent wish to be relieved of further participation, it is agreed that he will bear all expenses for the removal and storage of the tires and tubes at a place designated by the Principal.

8. To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth.

9. The Principal agrees to compensate the Agent for the storage and handling of tires and tubes in the manner above provided at the following rates:

(a) Handling in and out: 3c per tire and 1c per tube.

(b) Storage: 1½c per month per tire and ½c per month per tube.

No other compensation of any kind will be paid by Principal to Agent.

The sums above set forth shall be paid by the Principal to the Agent within ten (10) days after receipt by the Principal from the governmental agency or agencies of sums hereinabove set forth.

10. No Member of or Delegate to the Congress

of the United States of America, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract so far as it is made with a corporation for its general benefit.

11. In the employment of workers for the performance of this contract, the Agent shall not discriminate against any worker because of race, creed, color or national origin.

12. The Agent shall comply with the requirements of the Walsh-Healy Act (Act of June 30, 1936, 49 Stat. 2036; U.S. Code, Title 41, Sec. 35-45) insofar as such Act is applicable to this transaction.

It is contemplated that the Principal will issue its Warehouse Receipts to the governmental agency or agencies for whom it acts as custodian, and the Agent therefore agrees to deliver regular reports to the Principal as frequently as the Principal may require, evidencing the receipt by it of tires and tubes during that period; to deliver to the Principal copies of all receipts or other documents issued by the Agent and to permit the release of tires and tubes only upon written authority of the Principal.

It is agreed that the Principal shall have the right to examine the records kept by the Agent whenever the Principal desires to do so, and the Agent will assist the Principal in making a physi-

cal inventory of the tires and tubes whenever required.

CAPITOL CHEVROLET
COMPANY
/s/ JAMES A. KENYON, Pres.,
Agent.
LAWRENCE WAREHOUSE
COMPANY,
/s/ By CLYDE HINDRICH,
Principal.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 6, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF CROSS-DEFENDANT CAPITOL CHEVROLET COMPANY

Come now cross-defendant, Capitol Chevrolet Company, a corporation, and for answer to the cross-claim on file herein admits, denies and alleges:

I.

Answering paragraph I of the cross-claim, cross-defendant admits the allegations contained therein.

II.

Answering paragraph II of the cross-claim, cross-defendant denies the allegations contained therein.

III.

Answering paragraph III of the cross-claim,

cross-defendant admits the allegations contained therein.

IV.

Answering paragraph IV of the cross-claim, cross-defendant admits all the allegations contained therein, except that cross-defendant denies that the date on which the judgment became final was June 16, 1949, or on or about that date.

V.

Answering paragraph V of the cross-claim, cross-defendant denies all the allegations therein, except the allegation that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending such action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-defendant denies that it has any knowledge or information sufficient to form a belief as to that allegation therein contained and therefore denies said allegation.

VI.

Answering paragraph VI of the cross-claim, cross-defendant denies the allegations contained therein.

VII.

Answering paragraph VII of the cross-claim, cross-defendant denies that if judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, then cross-claimant is entitled to judgment against cross-

defendant for the amount of said judgment or for its costs, expenses or attorneys' fees incurred in defending the action referred to in Paragraph IV of cross-claimant's first cross-claim. All other allegations contained in paragraph VII are admitted.

VIII.

Cross-defendant denies each and every allegation in the cross-claim not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within two years next before commencement of this action.

Second Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within three years next before the commencement of this action.

Third Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within four years next before the commencement of this action.

Fourth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within five years next before the commencement of this action.

Fifth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim was previously set forth by cross-claimant against cross-defendant in the action referred to in Para-

graph IV of cross-claimant's first cross-claim. Full opportunity for presentation of the facts and law relating to said claim was afforded cross-claimant therein. Judgment has become final on said action, and cross-claimant is therefore barred from again suing on the same claim for relief.

Sixth Separate and Distinct Defense.

If it is found that cross-defendant's negligence was a cause of the damage on which the judgment sued upon herein is based, then cross-defendant alleges that cross-claimant was equally, jointly and/or contributorily negligent, and for that reason cannot maintain this action.

IX.

Answering paragraph I of cross-claimant's second, separate and further cross-claim, cross-defendant repleads the admissions or denials of paragraphs I, II, III and IV of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

X.

Answering paragraph II of the second cross-claim, cross-defendant admits the allegations contained therein.

XI.

Answering paragraph III of the second cross-claim, cross-defendant admits that it agreed to indemnify cross-claimant against loss or damage resulting from a failure on its part to perform any

of the duties and obligations set forth in said contract. Cross-defendant denies that it has any knowledge or information sufficient to form a belief that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action and therefore cross-defendant denies this allegation.

All other allegations contained in said paragraph III are denied.

XII.

Answering paragraph IV of the second cross-claim, cross-defendant repleads paragraphs VI and VII of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Separate and Distinct Defenses.

As added, separate and distinct defenses to the second cross-claim, cross-defendant repleads the First, Second, Third, Fourth, Fifth and Sixth Separate and Distinct Defenses set out in its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Wherefore, cross-defendant Capitol Chevrolet Company prays judgment that cross-claimant take

nothing by reason of its said cross-claims and that said cross-claims be dismissed.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL PATTERSON,

/s/ By ARTHUR H. DEIBERT,

Attorneys for Capitol Chevrolet Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF CROSS-DEFENDANT CAPITOL CHEVROLET CO.

Comes now cross-defendant, Capitol Chevrolet Co., a corporation, and for answer to the cross-claim on file herein admits, denies and alleges:

I.

Answering paragraph I of the cross-claim, cross-defendant admits the allegations contained therein.

II.

Answering paragraph II of the cross-claim, cross-defendant denies the allegations contained therein.

III.

Answering paragraph III of the cross-claim, cross-defendant admits the allegations contained therein.

IV.

Answering paragraph IV of the cross-claim, cross-defendant admits all the allegations contained therein, except that cross-defendant denies that the date on which the judgment became final was June 16, 1949, or on or about that date.

V.

Answering paragraph V of the cross-claim, cross-defendant denies all the allegations therein, except the allegation that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-defendant denies that it has any knowledge or information sufficient to form a belief as to that allegation therein contained and therefore denies said allegation.

VI.

Answering paragraph VI of the cross-claim, cross-defendant denies the allegations contained therein.

VII.

Answering paragraph VII of the cross-claim, cross-defendant denies that if judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, then cross-claimant is entitled to judgment against cross-defendant for the amount of said judgment or for its costs, expenses or attorneys' fees incurred in defending the action referred to in paragraph IV

of cross-claimant's first cross-claim. All other allegations contained in paragraph VII are admitted.

VIII.

Cross-defendant denies each and every allegation in the cross-claim not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within two years next before commencement of this action.

Second Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within three years next before the commencement of this action.

Third Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within four years next before the commencement of this action.

Fourth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within five years next before the commencement of this action.

Fifth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim against cross-defendant Capitol Chevrolet Company was previously set forth by cross-claimant against the said Capitol Chevrolet Company in the action referred to in Paragraph IV of cross-claimant's first cross-claim. Full opportunity for presentation of the facts and law relating to said claim was afforded cross-claimant therein. Judgment has be-

come final on said action and cross-claimant is therefore barred from suing on the same claim for relief, or from suing cross-defendant Capitol Chevrolet Co. herein as transferee.

Sixth Separate and Distinct Defense.

If it is found that cross-defendant Capitol Chevrolet Company's negligence was a cause of the damage on which the judgment sued upon herein is based, then cross-defendant alleges that cross-claimant was equally, jointly and/or contributorily negligent, and for that reason cannot maintain this action.

Seventh Separate and Distinct Defense.

The cross-claim fails to state a claim against cross-defendant upon which relief can be granted.

IX.

Answering paragraph I of cross-claimant's second, separate and further cross-claim, cross-defendant repleads the admissions or denials of paragraphs I, II, III and IV of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

X.

Answering paragraph II of the second cross-claim, cross-defendant admits the allegations contained therein.

XI.

Answering paragraph III of the second cross-claim, cross-defendant admits that cross-defendant

Chevrolet Company agreed to indemnify cross-claimant against loss or damage resulting from a failure on its part to perform any of the duties and obligations set forth in said contract. Cross-defendant denies that it has any knowledge or information sufficient to form a belief that cross-complainant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action and therefore cross-defendant denies this allegation.

All other allegations contained in said paragraph III are denied.

XII.

Answering paragraph IV of the second cross-claim, cross-defendant repleads paragraphs VI and VII of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Separate and Distinct Defenses.

As added, separate and distinct defenses to the second cross-claim, cross-defendant repleads the First, Second, Third, Fourth, Fifth, Sixth and Seventh Separate and Distinct Defenses set out in its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Wherefore, cross defendant Capitol Chevrolet Co. prays judgment that cross-claimant take nothing by reason of its said cross-claims and that said cross-claims be dismissed.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL PATTERSON

/s/ By ARTHUR H. DEIBERT,
Attorneys for Capitol Chevrolet Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF CROSS-DEFENDANT JAMES A. KENYON

Comes now cross-defendant, James A. Kenyon, and for answer to the cross-claim on file herein admits, denies and alleges:

I.

Answering paragraph I of the cross-claim, cross-defendant admits the allegations contained therein.

II.

Answering paragraph II of the cross-claim, cross-defendant denies the allegations contained therein.

III.

Answering paragraph III of the cross-claim, cross-defendant admits the allegations contained therein.

IV.

Answering paragraph IV of the cross-claim, cross-defendant admits all the allegations contained therein, except that cross-defendant denies that the date on which the judgment became final was June 16, 1949, or on or about that date.

V.

Answering paragraph V of the cross-claim, cross-defendant denies all the allegations therein, except the allegation that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-defendant denies that he has any knowledge or information sufficient to form a belief as to that allegation therein contained and therefore denies said allegation.

VI.

Answering paragraph VI of the cross-claim, cross-defendant denies the allegations contained therein.

VII.

Answering paragraph VII of the cross-claim, cross-defendant denies that if judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, then cross-claimant is entitled to judgment against cross-defendant for the amount of said judgment or for its costs, expenses or attorneys' fees incurred in

defending the action referred to in paragraph IV of cross-claimant's first cross-claim. All other allegations contained in paragraph VII are admitted.

VIII.

Cross-defendant denies each and every allegation in the cross-claim not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within two years next before commencement of this action.

Second Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within three years next before the commencement of this action.

Third Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within four years next before the commencement of this action.

Fourth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within five years next before the commencement of this action.

Fifth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim against cross-defendant Capitol Chevrolet Company was previously set forth by cross-claimant against the said Capitol Chevrolet Company in the action referred to in Paragraph IV of cross-claimant's first cross-claim. Full opportunity for presentation of the facts and law relating to said claim was af-

forded cross-claimant therein. Judgment has become final on said action and cross-claimant is therefore barred from suing on the same claim for relief, or from suing cross-defendant James A. Kenyon herein as transferee.

Sixth Separate and Distinct Defense.

If it is found that cross-defendant Capitol Chevrolet Company's negligence was a cause of the damage on which the judgment sued upon herein is based, then cross-defendant alleges that cross-claimant was equally, jointly and/or contributorily negligent, and for that reason cannot maintain this action.

Seventh Separate and Distinct Defense.

The cross-claim fails to state a claim against cross-defendant upon which relief can be granted.

IX.

Answering paragraph I of cross-claimant's second, separate and further cross-claim, cross-defendant repleads the admissions or denials of paragraphs I, II, III and IV of his answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

X.

Answering paragraph II of the second cross-claim, cross-defendant admits the allegations contained therein.

XI.

Answering paragraph III of the second cross-

claim, cross-defendant admits that cross-defendant Capitol Chevrolet Company agreed to indemnify cross-claimant against loss or damage resulting from a failure on its part to perform any of the duties and obligations set forth in said contract. Cross-defendant denies that he has any knowledge or information sufficient to form a belief that cross-complainant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action and therefore cross-defendant denies this allegation.

All other allegations contained in said paragraph III are denied.

XII.

Answering paragraph IV of the second cross-claim, cross-defendant repleads paragraphs VI and VII of his answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Separate and Distinct Defenses.

As added, separate and distinct defenses to the second cross-claim, cross-defendant repleads the first, second, third, fourth, fifth, sixth and seventh separate and distinct defenses set out in his answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Wherefore, cross-defendant James A. Kenyon prays judgment that cross-claimant take nothing by reason of its said cross-claims and that said cross-claims be dismissed.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL PATTERSON,

/s/ By ARTHUR H. DEIBERT,

Attorneys for James A. Kenyon.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause No. 30473.]

SEPARATE JUDGMENT AGAINST DEFENDANTS LAWRENCE WAREHOUSE COMPANY, SEABOARD SURETY COMPANY, V. J. McGREW, AND CAPITOL CHEVROLET COMPANY.

Pre-trial conference having been held in the above-entitled cause on November 9, 1951, and plaintiff having moved for judgment on the pleadings against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, and it appearing to the court that the defendant V. J. McGrew has defaulted and that no issue of fact whatever exists as respects any of said defendants named above, and said defendants Lawrence Warehouse Company, Seaboard Surety Company and Capitol Chev-

rolet Company having been given an opportunity to present memoranda on issues of law and having waived said opportunity, and good cause appearing therefor;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff Reconstruction Finance Corporation do have and recover of and from defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, jointly and severally, the sum of $42,171.70, plus interest thereon at the rate of 7% per annum from April 15, 1946, to and including the day of entry of this judgment, together with plaintiff's costs of suit herein incurred to be taxed in the manner provided by law and the rules of court, the entire judgment to bear interest from the date of entry at the rate of 7% per annum until paid, and plaintiff shall have execution therefor at any time on or after December 1, 1951, but enforcement of said judgment shall be stayed until December 1, 1951.

Entry of this judgment shall be without prejudice to further prosecution by plaintiff of its suit herein against defendants James A. Kenyon and Capitol Chevrolet Co. or either of them, and it shall be without prejudice to the further prosecution by cross-claimant Lawrence Warehouse Company of its cross-claim against cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. or any of them, and it shall be without prejudice to the further prosecution by cross-claimant Seaboard Surety Company of its

cross-claim against the cross-defendant Lawrence Warehouse Company.

Dated: November 20th, 1951.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 5(d).

/s/ WALLACE, GARRISON, NORTON & RAY, Attorneys for defendant Lawrence Warehouse Company.

/s/ WORTHINGTON, PARK & WORTHINGTON, Attorneys for defendant Seaboard Surety Company.

/s/ HERBERT W. CLARK, Morrison, Hohfeld, Foerster, Shuman & Clark, Attorneys for defendant Capitol Chevrolet Company.

Counsel for defendant Lawrence Warehouse Company having given assurance that the above judgment would be paid on December 1, 1951, we hereby consent that enforcement of the above judgment may be stayed until December 1, 1951.

/s/ MOSES LASKY,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for plaintiff Reconstruction Finance Company.

Entered in Civil Docket Nov. 21, 1951.

[Endorsed]: Filed Nov. 20, 1951.

[Title of District Court and Cause No. 30473.]

INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT JAMES A. KENYON.

To Cross-Defendant James A. Kenyon and to Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, his Attorneys:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Claimant Lawrence Warehouse Company hereby submits and propounds the following interrogatories to be answered separately and fully in writing and under oath by Cross-Defendant James A. Kenyon:

1. Were you a stockholder of Capitol Chevrolet Company at any time between October 1, 1942, and June 5, 1944? If so, how many shares of stock of said corporation did you own, and on what dates?

2. Were you a director of Capitol Chevrolet Company at any time between October 1, 1942, and June 5, 1944? If so, state the periods of time involved.

3. Were you an officer of Capitol Chevrolet Company at any time between October 1, 1942, and June 5, 1944? If so, what was your office, and for what periods of time?

4. What assets of Capitol Chevrolet Company were distributed to you prior to the filing of its Certificate of Winding Up and Dissolution on June

5, 1944, or thereafter? What disposition did you make of those assets?

5. What provisions were made for the payment of debts and liabilities of Capitol Chevrolet Company prior to the filing of its Certificate of Winding Up and Dissolution on June 5, 1944, or thereafter?

6. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of the liability of Capitol Chevrolet Company in that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, Defendants"?

7. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of any liability of Capitol Chevrolet Company under that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company, which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein?

8. Did you at any time assume any liability of Capitol Chevrolet Company? If so, in what form was said assumption and were any instruments

made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

9. Did you at any time assume the liability of Capitol Chevrolet Company under that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, Defendants?" If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

10. Did you at any time assume the liability of Capitol Chevrolet Company under that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company, which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein? If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

11. Who carried on the business of Capitol Chevrolet Company after the filing of its Certificate of Winding Up and Dissolution on June 5, 1944?

12. In what form of business organization was the business of Capitol Chevrolet Company carried

on after the filing of its Certificate of Winding Up and Dissolution on June 5, 1944?

13. If your answer to interrogatory number 12 is that the business was carried on as a partnership, state the names and capital investments made by all partners, general and limited.

14. Were you on or about the 13th day of February, 1945, the owner of the Capitol Chevrolet Company?

15. Were you at any time on or after April 10, 1946, a stockholder in Capitol Chevrolet Co.? If so, how many shares of stock of said corporation did you own and on what dates?

16. Were you at any time on or after April 10, 1946, a director of Capitol Chevrolet Company? If so, state the periods of time involved.

17. Were you at any time on or after April 10, 1946, an officer of the Capitol Chevrolet Co.? If so, what was your office and for what periods of time?

18. Did you transfer any property or assets to Capitol Chevrolet Co. at any time? If so, state in detail the property or assets which you transferred to that corporation and the dates of transfer.

19. Did Capitol Chevrolet Co. at any time assume any of your liabilities? If so, state what liabilities and on what dates they were assumed. If any written instruments were made or executed in connection with said assumption, describe said instruments and state the location of the originals thereof.

20. If your answer to interrogatory number 8

was in the affirmative, did Capitol Chevrolet Co. at any time assume any liabilities which you assumed from Capitol Chevrolet Company? If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

21. If your answer to interrogatory number 9 was in the affirmative, did Capitol Chevrolet Co. at any time assume any liability which you assumed from Capitol Chevrolet Company under that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, defendants?" If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

22. If your answer to interrogatory number 10 was in the affirmative, did Capitol Chevrolet Co. at any time assume any liability which you assumed from Capitol Chevrolet Company in connection with that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein? If so, in what form was said assumption and were any instruments made or ex-

ecuted in connection therewith? If so, describe said instruments and state the location of the originals thereof.

Dated: November 28, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 29, 1951.

[Title of District Court and Cause No. 30473.]

INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET COMPANY.

To Cross-Defendant Capitol Chevrolet Company and to Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark, Esq., and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, its Attorneys:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Claimant Lawrence Warehouse Company hereby submits and propounds the following interrogatories to be answered separately and fully in writing and under oath by Cross-Defendant Capitol Chevrolet Company:

1. What were the names of all of the sharehold-

ers and the number of shares owned by each shareholder of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944?

2. What were the names of the directors of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944?

3. What were the names and respective offices of all of the officers of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944?

4. What provisions were made for the payment of debts and liabilities of Capitol Chevrolet Company prior to the filing of its Certificate of Winding Up and Dissolution on June 5, 1944, or thereafter?

5. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of the liability of Capitol Chevrolet Company in that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, defendants"?

6. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of any liability of

Capitol Chevrolet Company under that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company, which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein?

7. Were any written instruments made or executed by any person or corporation in connection with the assumption of the debts and liabilities of Capitol Chevrolet Company referred to in interrogatories numbered 4, 5 and 6? If so, describe said instruments and state the location of the originals thereof.

8. To whom and in what amounts were the assets of Capitol Chevrolet Company distributed prior to the filing of its Certificate of Winding Up and Dissolution on June 5, 1944, or thereafter?

9. What assets of Capitol Chevrolet Company were distributed to James A. Kenyon in connection with the dissolution of Capitol Chevrolet Company?

10. Did James A. Kenyon assume any debts or liabilities of Capitol Chevrolet Company upon its dissolution or at any time? If so, what debts or liabilities were assumed and in what form was the assumption thereof by James A. Kenyon? If any written instruments were made or executed in connection with said assumption, describe said instruments and state the location of the originals thereof.

11. What person, persons or corporation carried on the business of Capitol Chevrolet Company after the filing of its Certificate of Winding Up and Dissolution on June 5, 1944?

Dated: November 28, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 29, 1951.

[Title of District Court and Cause No. 30473.]

INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET CO.

To Cross-Defendant Capitol Chevrolet Co. and to Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, its Attorneys:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Claimant Lawrence Warehouse Company hereby submits and propounds the following interrogatories to be answer separately and fully in writing and under oath by Cross-Defendant Capitol Chevrolet Co.:

1. When was Capitol Chevrolet Co. incorporated?

2. Who were the stockholders and the number of shares of stock held by each stockholder from the date of incorporation of Capitol Chevrolet Co. to the present date?

3. Who were the directors of Capitol Chevrolet Co. at all times from the date of its incorporation to the present date?

4. Who were the officers of Capitol Chevrolet Co. and their respective offices at all times from the date of its incorporation to the present date?

5. What interest has James A. Kenyon had in Capitol Chevrolet Co. at all times from the date of its incorporation to the present date?

6. What money or other property or assets did James A. Kenyon contribute, for stock or otherwise, to Capitol Chevrolet Co. at any time between the date of its incorporation and the present date?

7. Did Capitol Chevrolet Co. at any time assume any liability or liabilities of James A. Kenyon? If so, state what liabilities and upon what dates they were assumed. If any written instruments were made or executed in connection with said assumption, describe said instruments and state the location of the originals thereof.

8. Did Capitol Chevrolet Co. at any time assume any liability of James A. Kenyon or of any other person or corporation under that certain action pending in the District Court of the United States

of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, defendants?" If so, in what form was said assumption and were any written instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

9. Did Capitol Chevrolet Co. at any time assume any liability of James A. Kenyon or of any other person or corporation in connection with that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein? If so, in what form was said assumption and were any written instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

Dated: November 28, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 29, 1951.

[Title of District Court and Cause No. 30473.]

ASSIGNMENT OF JUDGMENT

Know All Men by These Presents:

That Reconstruction Finance Corporation, a Federal corporation created by and organized under an act of Congress of the United States, in consideration of the sum of Fifty-eight Thousand Eight Hundred Fifty-nine Dollars and Ninety Cents ($58,859.90), paid to it by Lawrence Warehouse Company, a corporation, the receipt of which sum is hereby acknowledged, has assigned and by these presents does assign unto the said Lawrence Warehouse Company the separate judgment for the use and benefit of Reconstruction Finance Corporation, plaintiff in said action, and against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, for the sum of Forty-two Thousand One Hundred Seventy-one Dollars and Seventy Cents ($42,171.70) plus interest thereon at the rate of Seven Per Cent (7%) per annum from April 15, 1946, to and including the 21st day of November, 1951, with costs in the sum of Twenty Dollars ($20.00), which said judgment was entered in the within cause on the 21st day of November, 1951; and

There is hereby assigned to said Lawrence Warehouse Company all right and power to collect and enforce payment of said judgment, but said Reconstruction Finance Corporation will not be held

liable for any expense or damage which may arise from the collection and enforcement of said judgment.

In Witness Whereof, this assignment has been made and executed this 29th day of November, 1951.

RECONSTRUCTION FINANCE CORPORATION,
/s/ By PAUL V. WAGNER,
Acting Manager.

Approved:

/s/ BROBECK, PHLEGER & HARRISON
Attorneys for Reconstruction Finance Corporation

[Endorsed]: Filed December 7, 1951.

[Title of District Court and Cause No. 30473.]

NOTICE OF PAYMENT OF JUDGMENT AND CLAIM TO CONTRIBUTION OR REPAYMENT

To C. W. Calbreath, Clerk of the Above-Entitled Court:

You will please take notice that on the 21st day of November, 1951, Reconstruction Finance Corporation, plaintiff above named, recovered a separate judgment in the within cause against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, for the sum of Forty-Two

Thousand One Hundred Seventy-One Dollars and Seventy Cents ($42,171.70) plus interest at the rate of Seven Per Cent (7%) per annum from April 15, 1946, to and including the 21st day of November, 1951, and Twenty Dollars ($20.00) costs of suit.

You are further notified that on the 1st day of December, 1951, defendant Lawrence Warehouse Company, a corporation, while said judgment and the whole thereof was in full force and effect, paid to the Reconstruction Finance Corporation the sum of Fifty-Eight Thousand Eight Hundred Fifty-Nine Dollars and Ninety Cents ($58,859.90) in full payment, discharge and satisfaction of said judgment.

You are further notified that the defendant Lawrence Warehouse Company, a corporation, claims the right to contribution or repayment from its co-defendant Capitol Chevrolet Company, a corporation, of the full sum of said judgment, and in order that the defendant Lawrence Warehouse Company may be entitled to the benefit of said judgment for the purpose of enforcing contribution or repayment from the said co-defendant Capitol Chevrolet Company, you are requested upon the filing of this notice to make an entry thereof in the margin of the docket.

Dated: December 6th, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for defendant Lawrence Warehouse Company

[Endorsed]: Filed December 7, 1951.

[Title of District Court and Cause No. 30473.]

FIRST AMENDED ANSWER TO CROSS-COMPLAINT

Comes now each of the cross-defendants, Capitol Chevrolet Company, a corporation, James A. Kenyon and Capitol Chevrolet Co., a corporation, and, severally and not jointly, answers severally each of the two cross-claims averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein as follows:

As and for a First Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants deny the averments of paragraph II.

II.

Cross-defendants admit the averments of paragraph I and III.

III.

Answering paragraph IV, cross-defendants deny that the judgment in Civil Action No. 23171-G in the United States District Court for the Northern District of California became final on or about June 16, 1949, or at any time after April 15, 1946. Except as in this paragraph denied, defendants admit the averments of paragraph IV.

IV.

Answering paragraph V, cross-defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expense in defending said Civil Action No. 23171-G and will incur further attorneys' fees, costs and expenses in defending this action. They deny the remaining averments of paragraph V.

V.

Answering paragraph VI, cross-defendants admit that on or about May 31, 1943, James A. Kenyon and Adams Service Co. agreed that upon the transfer to them of the assets of Capitol Chevrolet Company they would assume and agree to pay all the debts, liabilities and obligations of said Capitol Chevrolet Company. Except as in this paragraph admitted, they deny the averments of paragraph VI.

VI.

Answering paragraph VII, cross-defendants admit the averments of the first sentence in said paragraph, and they deny the remaining averments of said paragraph.

As and for a Second Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

The first cross-claim fails to state facts sufficient to state a claim against cross-defendants, or any of them, upon which relief can be granted.

As and for a Third Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 3 of section 341 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within six months next before the commencement of this action.

As and for a Fourth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 339 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within two years next before the commencement of this action.

As and for a Fifth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 4 of section 338 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within three years next before the commencement of this action.

As and for a Sixth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 337 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for a Seventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by section 343 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for an Eighth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 336 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within five years next before the commencement of this action.

As and for a Ninth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California it was ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff therein, have and recover from defendants therein Lawrence Warehouse Company, a corporation, and cross-claimant herein, Capitol Chevrolet Company, a corporation, and one of the cross-defendants herein, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements in said action.

II.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California the Court found that said Lawrence Warehouse Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of goods of plaintiff therein, and said Court further found that the negligence of de-

fendants in said action, V. J. McGrew, said Lawrence Warehouse Company and said Capitol Chevrolet Company, concurred and joined together.

As and for a Tenth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Cross-claimant Lawrence Warehouse Company was equally, jointly and contributorily negligent, or negligent in any of said ways, with cross-defendant Capitol Chevrolet Company, in causing the damage for which judgment was rendered in Civil Action No. 23171-G in the United States District Court for the Northern District of California, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage.

II.

Cross-claimant Lawrence Warehouse Company had knowledge of, acquiesced in and consented to any negligence, if any there were, of said Capitol Chevrolet Company which caused or contributed to the cause of the damage for which judgment was rendered in said Civil Action No. 23171-G.

As and for an Eleventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file

herein, each of said cross-defendants, severally and not jointly, aver as follows:

I.

The claims of cross-claimant Lawrence Warehouse Company set forth in this action were set forth in Civil Action No. 23171-G in the United States District Court for the Northern District of California by cross-claimant herein Lawrence Warehouse Company against cross-defendant herein Capitol Chevrolet Company and final judgment has been rendered in said Civil Action No. 23171-G barring said Lawrence Warehouse Company from reasserting said claims in this action, or at all.

As and for a First Defense to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants admit the averments in paragraph II.

II.

Cross-defendants reaver, incorporate, and make a part hereof as though fully set forth herein, paragraphs I, II, III, V and VI of their First Defense to the First Cross-Claim.

III.

Answering paragraph III, cross-defendants admit

that on or about October 2, 1952, Capitol Chevrolet Company entered into a written contract with cross-claimant Lawrence Warehouse Company, a copy of which is Exhibit A attached to the answer and cross-claim herein of said Lawrence Warehouse Company. Cross-defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending Civil Action No. 23171-G in the United States District Court for the Northern District of California and will incur further attorneys' fees, costs and out-of-pocket expenses in defending this action. Except as herein admitted they deny the remaining averments of paragraph III.

As and for Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, reaver, incorporate and make a part hereof as though fully set forth herein, the averments in their Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the First Cross-Claim.

Wherefore, cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. pray that cross-claimant Lawrence Warehouse Company take nothing by this action and that cross-

defendants be awarded their costs of suit herein incurred.

Dated: San Francisco, January 3, 1952.

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.

Plaintiff Reconstruction Finance Corporation hereby consents to the filing of this First Amended Answer to Cross-Complaint.

/s/ BROBECK, PHLEGER & HARRISON

Defendant and Cross-Claimant Lawrence Warehouse Company hereby consents to the filing of this First Amended Answer to Cross-Complaint.

/s/ MAYNARD GARRISON, WALLACE, GARRISON, NORTON & RAY

Acknowledgment of Service attached.

[Endorsed]: Filed January 4, 1952.

[Title of District Court and Cause No. 30473.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET COMPANY

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Defendant Capitol Chevrolet Company hereby submits answers to the interrogatories propounded by Cross-Claimant Lawrence Warehouse Company on November 28, 1951.

1. The names of all of the shareholders and the number of shares owned by each shareholder of Capitol Chevrolet Company at all times between October 1, 1942 and June 5, 1944 are as follows: James A. Kenyon, 325 shares; Adams Service Co., 325 shares.

2. The names of the directors of Capitol Chevrolet Company at all times between October 1, 1942 and June 5, 1944 were: James A. Kenyon, G. A. Kenyon, and G. M. Westerfeld.

3. The names and respective offices of all the officers of Capitol Chevrolet Company at all times between October 1, 1942 and June 5, 1944 were: President, James A. Kenyon; Vice-President, G. A. Kenyon; Secretary, G. M. Westerfeld.

4. The debts and liabilities of Capitol Chevrolet Company were assumed by its shareholders upon dissolution.

5. The assumption referred to in the answer to Interrogatory No. 4 was a general assumption which would include the specific liability, if any, referred to in Interrogatory No. 5.

6. The assumption referred to in the answer to Interrogatory No. 4 was a general assumption which would include the specific liability, if any, referred to in Interrogatory No. 6.

7. The assumptions referred to in Interrogatories 4, 5 and 6 were made in writing in a ratification and approval of all the stockholders of Capitol Chevrolet Company of a resolution adopted at a special meeting of the Board of Directors of the Capitol Chevrolet Company on the 31st day of May, 1943.

The location of the originals thereof are not known. A copy from the personal file of Mr. Kenyon is attached thereto and marked "Exhibit A".

8. The assets of Capitol Chevrolet Company were distributed in equal shares to the two shareholders, Adams Service Co. and James A. Kenyon.

9. An undivided 50 per cent interest in Capitol Chevrolet Company was distributed to James A. Kenyon.

10. See answers to interrogatories numbers 4, 5, 6 and 7.

11. The business of the Capitol Chevrolet Company was carried on by Capitol Chevrolet Company, a limited partnership; James A. Kenyon was the

General Partner, and Adams Service Co., was the limited partner.

Dated: December 27, 1951.

CAPITOL CHEVROLET
COMPANY
/s/ By JAMES A. KENYON

Subscribed and sworn to before me, this 27th day of December, 1951.

[Seal] /s/ RUTH M. SUTTON
Notary Public in and for the California State and Sacramento County. My commission expires August 20, 1955.

EXHIBIT "A"

Ratification and Approval of All of the Stockholders of Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st Day of May, 1943.

We, being the sole stockholders of Capitol Chevrolet Company, do hereby ratify and approve the foregoing and above referred to Resolution and do hereby consent to and authorize the election of said corporation to wind up and dissolve; and do hereby agree that upon the transfer to us of the assets of said corporation, we will assume and agree to pay all the debts, liabilities and obligations of said corporation, and will assume and perform any and all leases under or upon which the said corporation is

now the lessee; and do further authorize the President and Secretary to have prepared and filed a Certificate of Election to Wind Up and Dissolve.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1952.

[Title of District Court and Cause No. 30473.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET CO.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Defendant Capitol Chevrolet Co. hereby submits the following answers to interrogatories propounded by Cross-Claimant Lawrence Warehouse Company, dated November 28, 1951:

1. Capitol Chevrolet Co. was incorporated April 10, 1946.

2. The stockholders and the number of shares held by each are as follows:

(a) From April 10, 1946 to December 21, 1949—F. Norman Phelps, 213 shares; Alice Phelps, 212 shares; James A. Kenyon, Trustee of Patricia May Kenyon Trust, 170 shares; J.A.K. Co., 255 shares.

(b) From December 21, 1949 to July 26, 1950—F. Norman Phelps, 148 shares; Alice Phelps, 147 shares; James A. Kenyon, Trustee of Patricia May Kenyon Trust, 40 shares; J.A.K. Co., 255 shares.

(c) From July 26, 1950 to present: F. Norman Phelps, 148 shares; Alice Phelps, 147 shares.

3. The directors of Capitol Chevrolet Co. are as follows:

(a) From April 10, 1946 to July 26, 1950—James A. Kenyon, F. Norman Phelps, Alice Phelps.

(b) From July 26, 1950 to present—F. Norman Phelps, Alice Phelps, P. J. Moffatt.

4. The officers of Capitol Chevrolet Co. are as follows:

(a) From April 10, 1946 to July 26, 1950—F. Norman Phelps, President; James A. Kenyon, Vice-President; Alice Phelps, Secretary-Treasurer.

(b) From July 26, 1950 to present: F. Norman Phelps, President; P. J. Moffatt, Vice-President; Alice Phelps, Secretary-Treasurer.

5. James A. Kenyon has never had any interest in Capitol Chevrolet Co. as an individual. However, as shown in answer to Interrogatory No. 2, the J.A.K. Co. and James A. Kenyon, Trustee, have held interests in this corporation. Mr. Kenyon at all times from April 10, 1946 to July 26, 1950 was sole shareholder of the J.A.K. Co.

6. All of the original shareholders of Capitol Chevrolet Co. contributed their interests in Capitol Chevrolet Co., limited partnership, as their contribution to capital of Capitol Chevrolet Co., the corporation.

7. No.

8. No.
9. No.

Dated: December 24th, 1951.

CAPITOL CHEVROLET CO.
/s/ By P. J. MOFFATT,
Vice President.

Subscribed and sworn to before me this 24th day of December, 1951.

[Seal] /s/ G. M. WESTERFELD,
Notary Public in and for the County of Sacramento, State of California.

EXHIBIT "A"

Ratification and Approval of All of the Stockholders of Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st Day of May, 1931.

We, being the sole stockholders of Capitol Chevrolet Company, do hereby ratify and approve the foregoing and above referred to Resolution and do hereby consent to and authorize the election of said corporation to wind up and dissolve; and do hereby agree that upon the transfer to us of the assets of said corporation, we will assume and agree to pay all the debts, liabilities and obligations of said corporation, and will assume and perform any and all leases under or upon which the said corporation is now the lessee; and do further authorize the

President and Secretary to have prepared and filed a Certificate of Election to Wind Up and Dissolve.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1952.

[Title of District Court and Cause No. 30473.]

AMENDMENT TO CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY

Comes Now Cross-Claimant Lawrence Warehouse Company, and pursuant to Stipulation signed and filed herein on January 9th, 1952 amends its cross-claim herein by changing the following numbered paragraphs to read as follows:

I.

Paragraph III of said Cross-Claim is amended by adding the following words thereto:

"Cross-defendant Adams Service Co. at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Nevada. Cross-defendants F. Norman Phelps and Alice Phelps were at all times mentioned herein the sole stockholders of cross-defendant Adams Service Co., and cross-claimant is informed and believes and therefore alleges that cross-defendant Adams Service Co. has never maintained any office and has never done any business or exercised any corporate functions except to hold stock in other corporations in its name for and on

behalf of cross-defendants F. Norman Phelps and Alice Phelps, and all of its acts were the acts of cross - defendants F. Norman Phelps and Alice Phelps. Cross-defendant J. A. K. Co. at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Nevada. Cross-defendant James A. Kenyon was at all times mentioned herein the sole stockholder of cross-defendant J. A. K. Co., and cross-claimant is informed and believes and therefore alleges that cross-defendant J. A. K. Co. has never maintained any office and has never done any business or exercised any corporate functions except to hold stock in other corporations in its name for and on behalf of cross-defendant James A. Kenyon, and all of its acts were the acts of cross-defendant James A. Kenyon."

II.

Paragraph VI of said Cross-claim is amended to read as follows:

"VI.

"Cross-claimant is informed and believes and therefore alleges that at all times mentioned herein cross-defendants James A. Kenyon and Adams Service Co. were the sole stockholders of cross-defendant Capitol Chevrolet Company, and that on or about May 31, 1943 the said stockholders of Capitol Chevrolet Company consented to the dissolution of said corporation; and that on or about June 5, 1944, cross-defendant Capitol Chevrolet Company filed with the Secretary of State of the

State of California its Certificate of Winding Up and Dissolution; that upon the dissolution of said cross-defendant Capitol Chevrolet Company all of its assets and properties were transferred to cross-defendants James A. Kenyon and Adams Service Co., and that cross-defendants James A. Kenyon and Adams Service Co., in consideration of the transfer to them of the properties and assets of the said corporation, assumed and agreed in writing to pay all of the debts, liabilities and obligations of said corporation, including the said liability of said cross-defendant Capitol Chevrolet Company to cross-claimant; that thereafter, and on or about April 10, 1946, cross-defendants James A. Kenyon and Adams Service Co. caused to be incorporated cross-defendant Capitol Chevrolet Co., causing the stock thereof to be issued in the names of (1) cross-defendant James A. Kenyon as trustee for his daughter, (2) cross-defendant J. A. K. Co., (3) cross-defendant F. Norman Phelps and (4) cross-defendant Alice Phelps; that cross-defendants James A. Kenyon and Adams Service Co. transferred to cross-defendant Capitol Chevrolet Co. all or part of the property and assets which cross-defendants James A. Kenyon and Adams Service Co. had received upon the dissolution of cross-defendant Capitol Chevrolet Company, and that cross defendant Capitol Chevrolet Co. received and accepted the transfer of the property and assets from cross-defendants James A. Kenyon and Adams Service Co. and then and there and in consideration thereof assumed and agreed to pay the liabilities of cross-

defendant Capitol Chevrolet Company and the liabilities of cross-defendants James A. Kenyon and Adams Service Co., including the said liability of cross-defendants Capitol Chevrolet Company, James A. Kenyon, and Adams Service Co. to cross-claimant."

III.

The second and third paragraphs of the prayer of said cross-claim are amended to read as follows:

"Defendant and cross-claimant Lawrence Warehouse Company further prays judgment against defendants and cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps, and each of them, for the sum of $8,835.44, and for such costs, expenses and attorneys' fees as it may incur in this action; and

"If judgment shall be entered in this action in favor of plaintiff and against defendant Lawrence Warehouse Company, that this defendant as cross-claimant may have and recover judgment against cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps, for the amount of any judgment which may be rendered in this action against defendant Lawrence Warehouse Company, together with interest that may accrue upon said judgment until the same

is paid; and for costs of suit and such other and further relief as may be proper in the premises."

Dated: February 15th, 1952.

/s/ W. R. WALLACE, Jr.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,

Attorneys for defendant and cross-claimant Lawrence Warehouse Company.

Leave granted to file this 15th day of Feb., 1952.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed February 15, 1952.

[Title of D. C. and Causes Nos. 23171-30473.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled consolidated actions came on regularly for trial of cross-claims on the 6th day of March, 1952, upon the evidence then introduced and upon the evidence introduced at the trial of said above-entitled cause No. 23171 on the 13th, 14th and 15th days of February, 1945, before the Court sitting without a jury, Maynard Garrison, Esq., John R. Pascoe, Esq., and Messrs. Wallace, Garrison, Norton & Ray appearing for cross-claim-

ant, Lawrence Warehouse Company, and James B. Isaacs, Esq., and Messrs. Dempsey, Thayer, Deibert & Kumler and Herbert W. Clark, Esq., and Richard J. Archer, Esq., and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, appearing for cross-defendants, Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps.

Evidence both oral and documentary having been introduced and the cause having been fully heard and tried and the Court having rendered its written opinion and order that judgment go in favor of Lawrence Warehouse Company on its cross-claims in No. 23171 against Capitol Chevrolet Company and in favor of Lawrence Warehouse Company, in No. 30473 against James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps, and that the cross-claims of Lawrence Warehouse Company against Capitol Chevrolet Company, Capitol Chevrolet Co., and J. A. K. Co., in No. 30473 be dismissed, now makes its Findings of Fact as follows:

Findings of Fact

I.

That at all of the times herein mentioned Lawrence Warehouse Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That at all of the times herein mentioned prior

to the 5th day of June, 1944, Capitol Chevrolet Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That all of the allegations contained in paragraph I of the Complaint of Defense Supplies Corporation are, and each of them is, true. That all of the allegations contained in paragraphs I, II, VII, IX, XI, and XII of the Complaint of Reconstruction Finance Corporation are, and each of them, is true.

IV.

That on or about the 1st day of March, 1943, cross-defendant Capitol Chevrolet Company entered into an agreement of lease of certain premises known as the "Ice Palace" and situated in West Sacramento, Yolo County, California; the said premises so leased were to be used by said cross-defendant for the purpose of storing tires and tubes belonging to plaintiff, Defense Supplies Corporation.

V.

That on or about April 9, 1943, while tires and tubes belonging to plaintiff, Defense Supplies Corporation, were so stored in said Ice Palace, Capitol Chevrolet Company negligently consented to and approved the entry of one V. J. McGrew into said "Ice Palace" and its attached engine and boiler room without ascertaining his intentions. That at said time and place said cross-defendant Capitol Chevrolet Company negligently failed to main-

tain adequate safeguards against fire. That said V. J. McGrew employed a torch in said engine and boiler room and in consequence of the negligent use thereof, and in consequence of the negligence of cross-defendant, Capitol Chevrolet Company, in failing to ascertain his intentions and prevent the use of said torch in view of the hazard involved and the lack of fire-fighting equipment, and its negligence in failing to maintain adequate safeguards against fire, a fire broke out and said "Ice Palace" and said tires and tubes were wholly destroyed and consumed by said fire.

VI.

That at all of the aforesaid times said cross-defendant Capitol Chevrolet Company was acting as agent of cross-claimant, Lawrence Warehouse Company, and that said cross-claimant did not have actual knowledge of or actually or affirmatively consent to or participate in any of the said negligent acts of Capitol Chevrolet Company.

VII.

That such agency of cross-defendant Capitol Chevrolet Company for cross-claimant, Lawrence Warehouse Company, was undertaken pursuant to a contract in writing dated the 1st day of October, 1942, wherein and whereby among other things said cross-defendant agreed to store and safeguard the storage of tires and tubes to be delivered to it by cross-claimant for plaintiff, Defense Supplies Corporation, and wherein and whereby said cross-defendant undertook and agreed to indemnify cross-

claimant against loss or damage resulting from a failure on the part of said cross-defendant to perform any of the duties and obligations imposed upon said cross-defendant under said agreement among which duties was the duty herein first set forth. That said above-mentioned tires and tubes stored in said "Ice Palace" by said cross-defendant were delivered to it by cross-claimant, Lawrence Warehouse Company, pursuant to the aforesaid terms and conditions of said above-mentioned written contract.

VIII.

That on or about the 31st day of December, 1943, all of the assets of said cross-defendant Capitol Chevrolet Company were transferred by it to James A. Kenyon and Adams Service Co., cross-defendants in No. 30473. That from and after the said transfer, said transferees actively participated in the defense of the complaint of Defense Supplies Corporation against defendants and in the defense of the cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company in said action No. 23171. That said cross-defendant transferees were the sole stockholders of cross-defendant Capitol Chevrolet Company, and at or about the time of said transfer of assets, said transferees, James A. Kenyon and Adams service Co., assumed in writing all of the liabilities of said transferor Capitol Chevrolet Company. That among the liabilities so assumed was the liability of said Capitol Chevrolet Company for the negligence hereinabove set forth and the liability of said Capitol

Chevrolet Company to Lawrence Warehouse Company under the above-mentioned Agency Agreement of October 1, 1942. That at the time of said transfer and subsequent thereto transferee Adams Service Co. was a corporation organized and existing under and by virtue of the laws of the State of Nevada. That said Adams Service Co. did not function as a corporation but was wholly controlled by F. Norman Phelps and Alice Phelps for their own personal benefit. That the property of said Adams Service Co. was dealt with by F. Norman Phelps and Alice Phelps as their own.

IX.

That following the transfer of the assets of Capitol Chevrolet Company to its stockholders on December 31, 1943, and the final dissolution of Capitol Chevrolet Company on June 5, 1944, the business of said Capitol Company was continued as a limited partnership, of which James A. Kenyon was the general partner and Adams Service Co. was the limited partner. That on or about the 10th day of April, 1946, cross-defendant Capitol Chevrolet Co., a corporation, was incorporated under the laws of the State of California. That on or about said 10th day of April, 1946, the assets of said Capitol Chevrolet Company, a limited partnership, were transferred to said Capitol Chevrolet Co., a corporation. That on or about said last mentioned date said Capitol Chevrolet Co., a corporation, issued to F. Norman Phelps 213 shares and to Alice Phelps 212 shares of the capital stock of said corporation.

That none of said shares of the capital stock of Capitol Chevrolet Co., a corporation, was issued to Adams Service Co., the limited partner in Capitol Chevrolet Company.

X.

That on the 21st day of November, 1951, plaintiff, Reconstruction Finance Corporation, recovered judgment against cross-claimant, Lawrence Warehouse Company, and cross-defendant Capitol Chevrolet Company in the amount of $42,171.70, plus interest at the rate of 7% per annum from April 15, 1946, to and including said 21st day of November, 1951, and costs in the amount of $20.00.

XI.

That on or about the 1st day of December, 1951, while said judgment was still in force and unsatisfied, cross-claimant, Lawrence Warehouse Company, paid plaintiff, Reconstruction Finance Corporation, the sum of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff.

XII.

That in the defense of the claims of plaintiff, Defense Supplies Corporation, and of plaintiff, Reconstruction Finance Corporation, cross-claimant Lawrence Warehouse Company incurred in good faith and in the exercise of a reasonable diligence the following costs and expenses each paid upon the date herein specified:

Attorneys' fees:	
January 2, 1948	$ 3,500.00
April 20, 1948	750.00
June 3, 1948	500.00
September 2, 1948	140.00
February 9, 1949	35.00
March 11, 1949	2,500.00
November 16, 1951	315.00
February 7, 1952	275.00
Other costs and expenses:	
December 15, 1947	770.53
December 20, 1947	3.44
February 26, 1948	54.62
March 12, 1948	32.28
April 20, 1948	77.87
May 12, 1948	12.23
August 9, 1948	4.88
November 10, 1948	68.90
December 15, 1948	2.19
March 11, 1949	273.30
May 4, 1949	85.90
June 13, 1949	16.20
October 6, 1950	1.19
March 13, 1951	9.68
April 13, 1951	2.23
June 15, 1951	7.31
August 8, 1951	1.50
	$ 9,439.25

That there should be deducted from said sum of $9,439.25 a refund of $5.00 received by cross-claimant on August 3, 1949, leaving a total net balance of $9,434.25.

XIII.

That it is not true that at the time and place of said fire, cross-claimant, Lawrence Warehouse Company, failed to exercise ordinary care, caution or prudence to avoid said fire or the damages resulting therefrom to plaintiffs or otherwise. That it is not true that said damages, or any thereof, were proximately caused or contributed to by any negligence or failure of said cross-claimant or its agents, guards, or watchmen to exercise ordinary care, caution or prudence to avoid said fire, other than by the failure of said cross-claimant's agent, Capitol Chevrolet Company, so to do.

XIV.

That it is true that the judgment of the above-entitled Court in Civil Action No. 23171 (23171 G) in favor of plaintiff therein became final on or about the 16th day of June, 1949, and untrue that said judgment in said cause became final on or prior to April 15, 1946.

XV.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants, were merged in the judgment rendered by the above entitled Court in Civil Action No. 23171 (23171 G) rendered on April 15, 1946, or in any other judgment of said Court but it is true that at and before the rendition of its judgment in said cause, said

Court, with the consent of all and without objection from any of the defendants in said cause, reserved jurisdiction to determine the cross-claims filed in said cause and that the same are now pending herein.

XVI.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants in Civil Action No. 23171 (23171 G) were merged in the findings of fact and conclusions of law rendered in said cause by the above-entitled Court on April 15, 1946, or otherwise or at all, but it is true that said findings of fact and conclusions of law related to and were made solely in connection with the claim of plaintiff and the answers of defendants and not otherwise or at all.

XVII.

That it is not true that cross-claimant, Lawrence Warehouse Company, permitted, directed or authorized the entry onto the premises known as the "Ice Palace" of the persons who used the torch causing the above-mentioned fire which resulted in the destruction of the above-mentioned tires and tubes.

XVIII.

That it is not true that the hazards from fire at the said "Ice Palace" which resulted in the destruction of the above-mentioned tires and tubes were known, consented to, accepted or assumed by cross-claimant, Lawrence Warehouse Company.

XIX.

That it is not true that all of the acts of the cross-defendant Capitol Chevrolet Company in the premises and particularly in connection with the aforesaid circumstances proximately causing said fire and the destruction of said tires and tubes were pursuant to any agreement between said cross-defendant and cross-claimant, Lawrence Warehouse Company, or that the same were, or any of them was, directed or authorized by said cross-claimant.

XX.

That it is not true that at the times mentioned in the cross-claim of Lawrence Warehouse Company cross-defendant Capitol Chevrolet Company had no dominion or control over the Lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

XXI.

That it is not true that the entry of said Lessors of said "Ice Palace" or V. J. McGrew or Charles Elmore, or any of them, was pursuant or subject to the terms or provisions of said lease between cross-defendant, Capitol Chevrolet Company, Lessee, and Clyde W. Henry and C. Parella, Lessor, dated the 1st day of March, 1943. That it is true that at the time immediately prior to said fire said V. J. McGrew was upon said premises for the purpose of removing pipe and equipment therefrom and not for the purpose of examining or inspecting the same or of making repair or repairs therein or in any part of said "Ice Palace" as said Lessors

Court, with the consent of all and without objection from any of the defendants in said cause, reserved jurisdiction to determine the cross-claims filed in said cause and that the same are now pending herein.

XVI.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants in Civil Action No. 23171 (23171 G) were merged in the findings of fact and conclusions of law rendered in said cause by the above-entitled Court on April 15, 1946, or otherwise or at all, but it is true that said findings of fact and conclusions of law related to and were made solely in connection with the claim of plaintiff and the answers of defendants and not otherwise or at all.

XVII.

That it is not true that cross-claimant, Lawrence Warehouse Company, permitted, directed or authorized the entry onto the premises known as the "Ice Palace" of the persons who used the torch causing the above-mentioned fire which resulted in the destruction of the above-mentioned tires and tubes.

XVIII.

That it is not true that the hazards from fire at the said "Ice Palace" which resulted in the destruction of the above-mentioned tires and tubes were known, consented to, accepted or assumed by cross-claimant, Lawrence Warehouse Company.

XIX.

That it is not true that all of the acts of the cross-defendant Capitol Chevrolet Company in the premises and particularly in connection with the aforesaid circumstances proximately causing said fire and the destruction of said tires and tubes were pursuant to any agreement between said cross-defendant and cross-claimant, Lawrence Warehouse Company, or that the same were, or any of them was, directed or authorized by said cross-claimant.

XX.

That it is not true that at the times mentioned in the cross-claim of Lawrence Warehouse Company cross-defendant Capitol Chevrolet Company had no dominion or control over the Lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

XXI.

That it is not true that the entry of said Lessors of said "Ice Palace" or V. J. McGrew or Charles Elmore, or any of them, was pursuant or subject to the terms or provisions of said lease between cross-defendant, Capitol Chevrolet Company, Lessee, and Clyde W. Henry and C. Parella, Lessor, dated the 1st day of March, 1943. That it is true that at the time immediately prior to said fire said V. J. McGrew was upon said premises for the purpose of removing pipe and equipment therefrom and not for the purpose of examining or inspecting the same or of making repair or repairs therein or in any part of said "Ice Palace" as said Lessors

Court, with the consent of all and without objection from any of the defendants in said cause, reserved jurisdiction to determine the cross-claims filed in said cause and that the same are now pending herein.

XVI.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants in Civil Action No. 23171 (23171 G) were merged in the findings of fact and conclusions of law rendered in said cause by the above-entitled Court on April 15, 1946, or otherwise or at all, but it is true that said findings of fact and conclusions of law related to and were made solely in connection with the claim of plaintiff and the answers of defendants and not otherwise or at all.

XVII.

That it is not true that cross-claimant, Lawrence Warehouse Company, permitted, directed or authorized the entry onto the premises known as the "Ice Palace" of the persons who used the torch causing the above-mentioned fire which resulted in the destruction of the above-mentioned tires and tubes.

XVIII.

That it is not true that the hazards from fire at the said "Ice Palace" which resulted in the destruction of the above-mentioned tires and tubes were known, consented to, accepted or assumed by cross-claimant, Lawrence Warehouse Company.

XIX.

That it is not true that all of the acts of the cross-defendant Capitol Chevrolet Company in the premises and particularly in connection with the aforesaid circumstances proximately causing said fire and the destruction of said tires and tubes were pursuant to any agreement between said cross-defendant and cross-claimant, Lawrence Warehouse Company, or that the same were, or any of them was, directed or authorized by said cross-claimant.

XX.

That it is not true that at the times mentioned in the cross-claim of Lawrence Warehouse Company cross-defendant Capitol Chevrolet Company had no dominion or control over the Lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

XXI.

That it is not true that the entry of said Lessors of said "Ice Palace" or V. J. McGrew or Charles Elmore, or any of them, was pursuant or subject to the terms or provisions of said lease between cross-defendant, Capitol Chevrolet Company, Lessee, and Clyde W. Henry and C. Parella, Lessor, dated the 1st day of March, 1943. That it is true that at the time immediately prior to said fire said V. J. McGrew was upon said premises for the purpose of removing pipe and equipment therefrom and not for the purpose of examining or inspecting the same or of making repair or repairs therein or in any part of said "Ice Palace" as said Lessors

deemed necessary in connection with said premises and building.

XXII.

That it is not true that cross-claimant, Lawrence Warehouse Company, was equally, jointly or contributorily negligent in any way with cross-defendants, Capitol Chevrolet Company and V. J. McGrew, or either of them, in causing the damage for which judgment was rendered in Civil Action No. 23171 (23171 G).

XXIII.

That it is not true that cross-claimant, Lawrence Warehouse Company, had knowledge of, acquiesced in, directed, authorized or consented to any negligence of cross-defendant Capitol Chevrolet Company which caused or contributed to the cause of the damage for which judgment was rendered in said cause, Civil Action 23171 (23171 G).

The Court makes the following Conclusions of Law from the foregoing Findings of Fact:

Conclusions of Law

I.

The motion of cross-defendant Capitol Chevrolet Company to dismiss the cross-claim of cross-claimant Lawrence Warehouse Company in Civil Action No. 23171 (23171 G) should be denied and cross-claimant Lawrence Warehouse Company is entitled to judgment in No. 23171 in its favor against said cross-defendant in the principal sum of $68,294.15, arrived at as follows:

December 1, 1951	$58,859.90
January 2, 1948	3,500.00
April 20, 1948	750.00
June 3, 1948	500.00
September 2, 1948	140.00
February 9, 1949	35.00
March 11, 1949	2,500.00
November 16, 1951	315.00
February 7, 1952	275.00
December 15, 1947	770.53
December 20, 1947	3.44
February 26, 1948	54.62
March 12, 1948	32.28
April 20, 1948	77.87
May 12, 1948	12.23
August 9, 1948	4.88
November 10, 1948	68.90
December 15, 1948	2.19
March 11, 1949	273.30
May 4, 1949	85.90
June 13, 1949	16.20
October 16, 1950	1.19
March 13, 1951	9.68
April 13, 1951	2.23
June 15, 1951	7.31
August 8, 1951	1.50
	68,299.15
August 3, 1949 Refund	5.00
	$68,294.15

together with interest on the above items at the rate of seven per cent (7%) per annum from the dates specified above to the date of entry of judgment, together with its costs of suit in said action incurred.

II.

The motion of cross-defendants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps to dismiss the cross-claim of Lawrence Warehouse Company in Civil Action No. 30473 and to strike evidence should be and is denied, and cross-claimant Lawrence Warehouse Company is entitled to Judgment in No. 30473 in its favor against said cross-defendants, jointly and severally, in the principal amount, together with interest thereon to the date of entry of judgment as in Conclusion of Law I hereinabove set forth and together with its costs of suit in said Civil Action 30473.

III.

Capitol Chevrolet Company having been long since dissolved when the cross-claim of Lawrence Warehouse Company against it in No. 30473 was filed, that action against it should be dismissed.

IV.

Capitol Chevrolet Co. and J. A. K. Co., not having assumed any of the liabilities of the Capitol Chevrolet Company or of its successors, are not liable for the obligations of Capitol Chevrolet Company and the action in No. 30473 against them should be dismissed.

Dated: February 11th, 1933.
/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 11, 1953.

In the United States District Court for the Northern District of California, Southern Division

No. 23171-G

DEFENSE SUPPLIES CORPORATION, Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, et al., Defendants.

LAWRENCE WAREHOUSE COMPANY, a corporation, Cross-claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation, Cross-Defendants.

No. 30473

RECONSTRUCTION FINANCE CORPORATION, Plaintiff,

vs.

CAPITOL CHEVROLET COMPANY, et al., Defendants.

JUDGMENT

The above entitled consolidated actions came on regularly for trial of cross-claims on the 6th day

of March, 1952, before the Court sitting without a jury, Maynard Garrison, Esq., John R. Pascoe, Esq., and Wallace, Garrison, Norton & Ray appearing for cross claimant Lawrence Warehouse Company, and James B. Isaacs, Esq. and Dempsey, Thayer, Deibert & Kumler and Herbert W. Clark, Esq., Richard J. Archer, Esq. and Morrison, Hohfeld, Foerster, Shuman & Clark appearing for cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps.

Evidence having been introduced, the cause having been submitted to the Court for consideration and decision and the Court having made and filed its Findings of Fact and Conclusions of Law therein;

Now, Therefore, it is Ordered, Adjudged and Decreed:

1. That cross-claimant Lawrence Warehouse Company do have and recover from cross-defendant Capitol Chevrolet Company on account of its cross-claim in action numbered 23171, the principal sum of $68,294.15, together with interest thereon in the amount of $7,975.58, or a total sum of $76,269.73.

2. That cross-claimant Lawrence Warehouse Company do have and recover from James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps, jointly and severally, on account of its cross-claims in action numbered 30473, the principal sum of $68,294.15 together with interest thereon in the amount of $7,975.58 or the total sum of $76,-

269.73, together with said cross-claimant's taxable costs and disbursements incurred in said action in the amount of $.....

3. That the cross-claims of cross-claimant Lawrence Warehouse Company against Capitol Chevrolet Company, Capitol Chevrolet Co. and J. A. K. Co. in action numbered 30473 be and the same are hereby dismissed, and that Capitol Chevrolet Company, Capitol Chevrolet Co. and J. A. K. Co. do have and recover against cross-claimant Lawrence Warehouse Company their several taxable costs and disbursements in said action in the following amounts:

Capitol Chevrolet Company	$.....
Capitol Chevrolet Co.	$.....
J. A. K. Co.	$.....

Dated: February 11th, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Not approved as to form this 29th day of January, 1953, because a separate judgment should be rendered, entered and filed in each of the above numbered actions and because, further,

So far as we are aware Adams Service Co. was not and is not a party to other action.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD,
FOERSTER, SHUMAN & CLARK

JAMES B. ISAACS,
DEMPSEY, THAYER, DIEBERT
& KUMLER,
/s/ By HERBERT W. CLARK,
Attorneys for Cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps.

Entered in Civil Docket Feb. 12, 1953.

MEMORANDUM OF COURT UPON SIGNING OF JUDGMENT

The attorneys for the cross-defendants have objected to the form of judgment as entered on the ground that no valid judgment can be rendered against the Adams Service Company, a Nevada corporation, because it was never served and never formerly appeared in this action.

Summons running to Adams Service Company, as well as to F. Norman Phelps and Alice Phelps, was personally served by the Marshal upon F. Norman Phelps and Alice Phelps. F. Norman Phelps and Alice Phelps were the sole stockholders and officers of the Adams Service Company. This corporation was employed by them solely for their own personal benefit. They dealt with its property as their own. It may be fairly said that the Phelps were the corporation. The marshal's return stated merely that summons had been served upon F. Norman Phelps and Alice Phelps. It did not state that they had been served in their capacity as officers

of the Adams Service Company. But, failure to make proof of service does not affect the validity of the service. Rule 4(g), F.R.C.P. Valid service may be made upon a foreign corporation by delivering a copy of the summons and of the complaint to an officer of the corporation. Rule 4(d) (3) F.R.C.P. Despite the fact that the marshal's return did not recite that the Phelps had been served as officers of the Adams Service Company, service upon them constituted valid service upon the corporation. Woodworkers Tool Works vs. Byrne, 191 F.2d 667 (9 Cir. 1951); M. Lowenstein & Sons vs. American Underwear Mfg. Co., 11 F.R.D. 172 (E.D.Pa.1951); Szabo vs. Keeshin Motor Express 10 F.R.D. 275 (N.D. Ohio 1950).

No pleading was filed in this action in behalf of Adams Service Company. But, prior to trial, the attorneys for the cross-defendants acknowledged receipt of a notice and order for the taking of depositions by affixing their signature as attorneys for cross-defendants when the cross-defendants named in the caption of the notice and order included Adams Service Company. In their written brief after trial these attorneys represented themselves as attorneys for Adams Service Company and argued against the liability of the corporation on the merits. A stipulation extending the time in which the cross-claimant might file a reply brief was signed by these attorneys as attorneys for the cross-defendants, the named cross-defendants including Adams Service Company. These attorneys filed in behalf of Adams Service Company pro-

posed amendments to the first proposed findings of fact and conclusions of law submitted by cross-claimant. These proposed amendments did not seek to eliminate the finding and conclusion of liability on the part of Adams Service Company. Upon the submission by cross-claimant of second proposed findings of fact and conclusions of law wherein the liability of Adams Service Company was again set forth no objection was made. It was not until a proposed judgment was submitted by cross-claimant that the attorneys for the cross-defendants objected that Adams Service Company was not a party to the action.

These activities of the attorneys for the cross-defendants, by which the court and all concerned were led to believe that Adams Service Company sought to defend itself on the merits constituted a binding appearance. Adams Service Company is a party to this action because it was validly served and appeared. The contention of its attorneys to the contrary at this stage of the proceedings is frivolous.

Dated: February 11, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 11, 1953.

[Title of District Court and Cause No. 30473.]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 16th day of February, 1952, I received the within summons and served F. Norman Phelps, personally, at 5117 Proctor, Oakland, Calif., on 2-16-52; also served Alice Phelps, by serving F. Norman Phelps, husband, at 5117 Proctor, Oakland, on 2-16-52.

Marshal's fees: Travel, $3.40; Service, $4.00; Total, $7.40.

JOHN A. ROSEEN,
United States Marshal,
/s/ By THOS. P. W. GOWAN,
Deputy United Sates Marshal.

[Endorsed]: Filed Feb. 18, 1952.

[Title of District Court and Cause No. 30473.]

NOTICE OF TIME AND PLACE OF TAKING DEPOSITION

To Cross-Defendants above named and to James B. Isaacs, Esq., Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark, Esq., Richard J. Archer, Esq., Morrison, Hohfeld, Foerster, Shuman & Clark, their attorneys:

You and each of you will please take notice that the deposition of Alice Phelps will be taken on behalf of Cross-Claimant on February 25, 1952, at 10:00 o'clock a.m., at the office of Paul F. St. Sure,

Attorney at Law, 1415 Financial Center Building, Oakland, California.

W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
/s/ By JOHN R. PASCOE,
Attorneys for Cross-Claimant Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 19, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO AMENDMENT TO CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY

Comes now each of the cross-defendants, Capitol Chevrolet Company, a corporation, James A. Kenyon, and Capitol Chevrolet Co., a corporation, and severally and not jointly answers the Amendment to Cross-Claim of Lawrence Warehouse Company, a corporation, on file herein as follows:

I.

Answering paragraph I of said Amendment to Cross-Claim (being an amendment to paragraph III of said Cross-Claim), said cross-defendants admit that from and after October 1, 1942, Adams

Service Co. was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Nevada. Said cross-defendants allege that from April 9, 1943, to some time between July 15, 1944, and March 31, 1946, the shares of stock of Adams Service Co. were all owned by Alice Phelps; that some time after July 15, 1944, and before March 31, 1946, F. Norman Phelps acquired all the shares of stock of Alice Phelps in Adams Service Co. Said cross-defendants further allege that from and after November, 1943, J. A. K. Co. (formerly Adams Service Company) was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Nevada; that some time after July 15, 1944, and before March 31, 1946, James A. Kenyon became the sole stockholder of J. A. K. Co. Except as in this answering paragraph admitted, said cross-defendants deny the averments of said paragraph I.

II.

Answering paragraph II of said Amendment to Cross-Claim (being an amendment to paragraph VI of said Cross-Claim), said cross-defendants deny that James A. Kenyon and Adams Service Co. transferred to cross-defendant Capitol Chevrolet Co. all the property and assets which James A. Kenyon and Adams Service Co. had received upon the dissolution of Capitol Chevrolet Company; they deny that Adams Service Co. transferred any assets to Capitol Chevrolet Co.; they deny that Capitol Chevrolet Co. assumed and agreed to pay the liabilities

of cross-defendant Capitol Chevrolet Company, the liabilities of James A. Kenyon or Adams Service Co. to cross-claimant or to any person or corporation whatsoever, or any other liabilities. They deny that Capitol Chevrolet Company was at any time, or is now, liable or indebted to cross-claimant in any sum whatsoever. Except as in this answering paragraph denied, said cross-defendants admit the averments of paragraph II.

Dated: San Francisco, February 25, 1952.

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 25, 1952.

[Title of District Court and Cause No. 30473.]

MOTION OF CROSS-DEFENDANTS TO DISMISS WITH PREJUDICE THE CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY

Comes now each of the cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps and each of said cross-defendants, severally, moves the above-styled Court to dismiss with prejudice the cross-claim of Lawrence Warehouse Company on the grounds that said cross-claim fails to state a claim upon which relief can be granted and that it affirmatively appears from said cross-claim and from the facts of which the Court takes judicial notice that cross-claimant Lawrence Warehouse Company is not entitled to any relief.

Dated: San Francisco, March 5, 1952.

/s/ JAMES B. ISAACS,

/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

/s/ HERBERT W. CLARK,

/s/ RICHARD J. ARCHER,

/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

The Judgment in No. 23171-G Unambiguously and Conclusively Establishes that both Lawrence Warehouse Company and Capitol Chevrolet Company were, as between themselves, Primary, Joint and Concurrently Tort-feasors.

A. The Judgment in No. 23171-G provides, in part, as follows:

"Now, Therefore, It Is Ordered, Adjudged and Decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $196.55."

(Emphasis added.)

B. A joint judgment against tort-feasors can be rendered only if the tort-feasors are each primarily liable for the tort.

Adams v. White Bus Line, 184 Cal. 710, at 713,714, 195 Pac. 389 (1921);

Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917).

II.

The Findings of Fact and Conclusions of Law in No. 23171-G Unambiguously and Conclusively Establish that Lawrence Warehouse Company was held Liable for its own Negligent Acts and that

Lawrence Warehouse Company and Capitol Chevrolet Company were Joint and Concurrent Tortfeasors.

A. The findings and conclusions state, in part, as follows:

"V.

"On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire."

"VI.

"The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

B. The specific finding that Lawrence Warehouse Company performed certain negligent acts which caused damage to plaintiff conclusively es-

tablishes that Lawrence Warehouse Company was a joint tort-feasor and primarily negligent.

Salter v. Lomardi, 116 C. A. 602, at 604, 3 P. 2d 38 (1931).

C. The specific conclusion that the negligence of Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods precludes the possibility that Lawrence Warehouse Company was held liable on a theory of respondeat superior.

Salter v. Lombardi, 116 C. A. 602, at 604, 3 P. 2d 38 (1931).

1. Where a principal is held liable solely for the tort of an agent, the principal and agent are not joint tort-feasors as the law employs that term.

Bradley v. Rosenthal, 154 Cal. 420, at 423, 97 Pac. 875 (1908);

Fimple v. Southern Pacific Co., 38 C. A. 727, 177 Pac. 871 (1918).

III.

Neither the judgment nor the Findings of Fact and Conclusions of Law in No. 23171-G can be Contradicted or "Explained" by Extrinsic Evidence.

Rothschild & Co. v. Marshall, 44 F. 2d 546 (9th Cir. 1930);

Moore v. Harjo, 144 F. 2d 318 (10th Cir. 1944).

B. The language of a judicial record may not be contradicted by extrinsic evidence that something different was intended; the principle of integration is especially applicable to judicial orders.

In re Crosby Stores, 65 F. 2d 360, at 361 (2d Cir. 1933);

Louisiana Land & Exp. Co. v. Parish of Jefferson, 59 F. Supp. 260, at 266 E. D. La. 1945);

Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F. Supp. 308 (E. D. Wis. 1940);

Builders Supply Co v. McCabe, 366 Pa. 322, 77 A. 2d 368 (1951), and cases there cited.

IV.

According to the Law of California, Lawrence Warehouse Company is Estopped by the Judgment in No. 23171-G in Favor of Defense Supplies Corporation from Denying that its own Primary Negligence Contributed to the Damage to Defense Supplies Corporation.

A. Only three questions are pertinent in determining the validity of a plea of res judicata: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication.

Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

B. The question of whether Lawrence Warehouse Company was itself negligent and primarily liable to Defense Supplies Corporation was in issue in No. 23171-G because: (1) The judgment, findings and conclusions so state. (2) The cross-claim

of Lawrence Warehouse Company was also pleaded by way of answer and avoidance to the claim of Defense Supplies Corporation.

1. The answer and cross-claim of Lawrence Warehouse Company reads, in part, as follows:

"And for a further and separate answer and by way of cross-claim against the defendants Clyde W. Henry, Constantine Parella and Capitol Chevrolet Company, this defendant and cross-claimant avers as follows:"

2. Defense Supplies Corporation averred the joint and concurrent negligence of Lawrence Warehouse Company and Capitol Chevrolet Company in the same language which the Court used in finding and concluding that Lawrence Warehouse Company and Capitol Chevrolet Company were joint and concurrent tort-feasors (Complaint, Pars. III and IV of Fourth Cause of Action).

3. As a matter of law, the question of primary or secondary liability is in issue in every case where one of several defendants in a tort action raises the defense that his liability is based solely on the tort of another.

Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875 (1908);

Salter v. Lombardi, 116 C. A. 602, at 604, 3 P. 2d 38 (1931).

IV.

According to the Law of California there is no

Right to Contribution or Indemnity Between Joint Tort-feasors.

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379 (1912);

Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389 (1921).

V.

By the Agreement, Exhibit A to the Complaint, Capitol Chevrolet Company Agreed to Indemnify Lawrence Warehouse Company only for the Failure of Capitol Chevrolet Company to Perform its own Duties.

A. Paragraph 8 of the Agreement provides:

"To indemnify the Principal [Lawrence Warehouse Company] against loss or damage resulting from a failure on the part of the Agent [Capitol Chevrolet Company] to perform any of the duties or obligations above set forth."

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO CROSS-COMPLAINT OF LAWRENCE WAREHOUSE COMPANY BY F. NORMAN PHELPS AND ALICE PHELPS

Comes now each of the cross-defendants, F. Norman Phelps and Alice Phelps, and, severally and not jointly, answers severally each of the two cross-claims averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, as follows:

As and for a First Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants deny the averments of paragraph II.

II.

Cross-defendants admit the averments of paragraphs I and III.

III.

Answering paragraph IV, cross-defendants deny that the judgment in Civil Action No. 23171-G in the United States District Court for the Northern District of California became final on or about June 16, 1949, or at any time after April 15, 1946. Except as in this paragraph denied, defendants admit the averments of paragraph IV.

IV.

Answering paragraph V, cross-defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expense in defending said Civil Action No. 23171-G and will incur further attorneys' fees, costs and expenses in defending this action. They deny the remaining averments of paragraph V.

V.

Answering paragraph VI, cross-defendants admit that on or about May 31, 1943, James A. Kenyon and Adams Service Co. agreed that upon the transfer to them of the assets of Capitol Chevrolet Company they would assume and agree to pay all the debts, liabilities and obligations of said Capitol Chevrolet Company. Except as in this paragraph admitted, they deny the averments of paragraph VI.

VI.

Answering paragraph VII, cross-defendants admit the averments of the first sentence in said paragraph, and they deny the remaining averments of said paragraph.

As and for a Second Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

The first cross-claim fails to state facts sufficient to state a claim against cross-defendants, or any of them, upon which relief can be granted.

As and for a Third Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 3 of sec-

tion 341 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within six months next before the commencement of this action.

As and for a Fourth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 339 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within two years next before the commencement of this action.

As and for a Fifth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 4 of section 338 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within three years next before the commencement of this action.

As and for a Sixth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 337 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for a Seventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by section 343 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for an Eighth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 336 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within five years next before the commencement of this action.

As and for a Ninth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein,

each of said cross-defendants, severally and not jointly, avers as follows:

I.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California, it was ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff therein, have and recover from defendants therein Lawrence Warehouse Company, a corporation, and cross-claimant herein, Capitol Chevrolet Company, a corporation, and one of the cross-defendants herein, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements in said action.

II.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California, the Court found that said Lawrence Warehouse Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of goods of plaintiff therein, and said Court further found that the negligence of defendants in said action, V. J. McGrew, said Lawrence Warehouse Company and said Capitol Chevrolet Company, concurred and joined together.

As and for a Tenth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Cross-claimant Lawrence Warehouse Company

was equally, jointly and contributorily negligent, or negligent in any of said ways, with cross-defendant Capitol Chevrolet Company, in causing the damage for which judgment was rendered in Civil Action No. 23171-G in the United States District Court for the Northern District of California, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage.

II.

Cross-claimant Lawrence Warehouse Company had knowledge of, acquiesced in, and consented to any negligence, if any there were, of said Capitol Chevrolet Company which caused or contributed to the cause of the damage for which judgment was rendered in said Civil Action No. 23171-G.

As and for an Eleventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

The claims of cross-claimant Lawrence Warehouse Company set forth in this action were set forth in Civil Action No. 23171-G in the United States District Court for the Northern District of California by cross-claimant herein Lawrence Warehouse Company against cross-defendant herein Capitol Chevrolet Company, and final judgment has been rendered in said Civil Action No. 23171-G barring said Lawrence Warehouse Company from reassserting said claims in this action, or at all.

As and for a First Defense to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants admit the averments in paragraph II.

II.

Cross-defendants reaver, incorporate, and make a part hereof as though fully set forth herein, paragraphs I, II, III, V and VI of their First Defense to the First Cross-Claim.

III.

Answering paragraph III, cross-defendants admit that on or about October 1, 1942, Capitol Chevrolet Company entered into a written contract with cross-claimant Lawrence Warehouse Company, a copy of which is Exhibit A attached to the answer and cross-claim herein of said Lawrence Warehouse Company. Cross-defendants state that -they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending Civil Action No. 23171-G in the United States District Court for the Northern District of California and will incur further attorneys' fees, costs and out-of-pocket expenses in defending this action. Except as herein admitted they deny the remaining averments of paragraph III.

As and for Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, reavers, incorporates and makes a part hereof as though fully set forth herein, the averments in their Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the First Cross-Claim.

Wherefore, cross-defendants F. Norman Phelps and Alice Phelps pray that cross-claimant Lawrence Warehouse Company take nothing by this action and that cross-defendants be awarded their costs of suit herein incurred.

Dated: San Francisco, March 5, 1952.

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.

Acknowledgment of Service attached.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO AMENDMENT TO CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY BY F. NORMAN PHELPS AND ALICE PHELPS

Comes now each of the cross-defendants F. Norman Phelps and Alice Phelps, and severally and not jointly, answers the Amendment to Cross-Claim of Lawrence Warehouse Company, a corporation, on file herein, as follows:

I.

Answering paragraph I of said Amendment to Cross-Claim (being an amendment to paragraph III of said Cross-Claim), said cross-defendants admit that from and after October 1, 1942, Adams Service Co. was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Nevada. Said cross-defendants allege that from April 9, 1943, to sometime between July 15, 1944, and March 31, 1946, the shares of stock of Adams Service Co. were all owned by Alice Phelps; that sometime after July 15, 1944, and before March 31, 1946, F. Norman Phelps acquired the interest of Adams Service Co. in Capitol Chevrolet Co., a partnership. Said cross-defendants further allege that from and after November, 1943, to on or about July 25, 1950, J. A. K. Co. (formerly Adams Serv-

ice Company), was a corporation organized and existing under and by virtue of the laws of the State of Nevada; that sometime after July 15, 1944, and before March 31, 1946, James A. Kenyon became the sole stockholder of J. A. K. Co. Except as in this answering paragraph admitted, said cross-defendants deny the averments of said paragraph I.

II.

Answering paragraph II of said Amendment to Cross-Claim (being an amendment to paragraph VI of said Cross-Claim), said cross-defendants deny that James A. Kenyon and Adams Service Co. transferred to cross-defendant Capitol Chevrolet Co. all the property and assets which James A. Kenyon and Adams Service Co. had received upon the dissolution of Capitol Chevrolet Company; they deny that Adams Service Co. transferred any assets to Capitol Chevrolet Co.; they deny that Capitol Chevrolet Co. assumed and agreed to pay the liabilities of cross-defendant Capitol Chevrolet Company, the liabilities of James A. Kenyon or Adams Service Co. to cross-claimant or to any person or corporation whatsoever, or any other liabilities. They deny that Capitol Chevrolet Company was at any time, or is now, liable or indebted to cross-claimant in any sum whatsoever. Except as in this answering paragraph denied, said cross-defendants admit the averments of paragraph II.

Dated: San Francisco, March 5, 1952.

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

Attorneys for Cross-Defendants F. Norman Phelps and Alice Phelps.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT JAMES A. KENYON

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Defendant James A. Kenyon hereby submits the following answers to interrogatories propounded by Cross-Claimant Lawrence Warehouse Company, dated November 28, 1951:

1. I was a stockholder of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944. During this period I owned 325 shares of the 650 shares outstanding.

2. I was a director of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944.

3. I was an officer of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944, serving as President of the corporation.

4. One-half of all the assets of the Capitol Chevrolet Company were distributed to me prior to the filing of the Certificate of Winding Up and Dissolution on June 5, 1944. These assets were immediately transferred to me into the Capitol Chevrolet Co., a limited partnership.

5. The stockholders assumed and agreed to pay all the debts, liabilities and obligations of the said corporation.

6. The assumption referred to in Interrogatory No. 5 was a general assumption and would cover the liability, if any, referred to in Interrogatory No. 6.

7. The assumption referred to in Interrogatory No. 5 was a general assumption and would cover the liability, if any, referred to in Interrogatory No. 7.

8. The assumption referred to in Interrogatory No. 5 was made in writing when the shareholders ratified and approved the resolution adopted at the special meeting of the Board of Directors and assumed the obligation. I do not know where the original is located. A copy of the assumption, taken from my personal files, is attached hereto and marked "Exhibit A".

9. The only assumption made is that described

in the general assumption marked "Exhibit A" and attached hereto.

10. The only assumption made is that described in the general assumption marked "Exhibit A" and attached hereto.

11. The business of Capitol Chevrolet Company was carried on after June 5, 1944, by Capitol Chevrolet Co., a limited partnership.

12. Capitol Chevrolet Co. was a limited partnership.

13. The names of the partners were: James A. Kenyon, General Partner and Adams Service Co., Limited Partner. The total investment of James A. Kenyon and of Adams Service Co. was $107,604.88-$53,842.44, respectively.

14. On or about the 13th day of February, 1945, I was an owner of the Capitol Chevrolet Co.

15. From April 17, 1946, to December 21, 1948, I owned no stock in the Capitol Chevrolet Co. as an individual. I did hold 170 shares as trustee under a Patricia May Kenyon Trust. 255 shares of stock were held during this period by the J.A.K. Co., a Nevada corporation. I owned all the stock in the J.A.K. Co. On December 21, 1948, to July 26, 1950, the Patricia May Kenyon Trust owned 40 shares and the J.A.K. Co. owned 255. After July 26, 1950, neither the trust nor the J.A.K. Co. has had any interest in Capitol Chevrolet Co.

16. I was a director of Capitol Chevrolet Company at all times between October 1, 1942, and June

5, 1944. Capitol Chevrolet Company did not exist after that date. I was a director of the Capitol Chevrolet Co., the corporation, from April 10, 1946, to July 26, 1950.

17. I was vice-president of Capitol Chevrolet Co. from April 10, 1946, to July 26, 1950.

18. I transferred assets to the Capitol Chevrolet Co., the partnership, as outlined in answer to Interrogatory No. 13. The assets consisted of cash in the amount of $7,348.15 and contracts, notes and accounts receivable, inventories of automobiles, automobile parts, accessories, gasoline, oil and grease, prepaid insurance, rent, taxes, machinery shop equipment, office furniture and fixtures and service cars, of the value of $46,495.31.

19. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, at any time assumed any of the liabilities.

20. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, assumed any liability which I had assumed from Capitol Chevrolet Company.

21. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, at any time assumed any liabilities which I had assumed from Capitol Chevrolet Company.

22. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, at any time assumed any liabilities which I had assumed from Capitol Chevrolet Company.

Dated: December .., 1951.

.....

Subscribed and sworn to before me this .. day of December, 1951.

.....

Notary Public in and for the County of....., State of.....

EXHIBIT "A"

Ratification and Approval of All of the Stockholders of Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st Day of May, 1943.

We, being the sole stockholders of Capitol Chevrolet Company, do hereby ratify and approve the foregoing and above referred to Resolution and do hereby consent to and authorize the election of said corporation to wind up and dissolve; and do hereby agree that upon the transfer to us of the assets of said corporation, we will assume and agree to pay all the debts, liabilities and obligations of said corporation, and will assume and perform any and all leases under or upon which the said corporation is now the lessee; and do further authorize the President and Secretary to have prepared and filed a Certificate of Election to Wind Up and Dissolve.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Causes 23171-30473.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that defendant and cross-claimant, Lawrence Warehouse Company, may have to and including the 25th day of March within which to file its opening brief in support of its cross-claim.

Dated: March 1, 1952.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ By RICHARD J. ARCHER,
Attorneys for Cross-Defendants
W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
/s/ By JOHN R. PASCOE,
Attorneys for Defendant and Cross-Claimant

It is so ordered:

/s/ LOUIS E. GOODMAN,
Judge of the United States District Court

[Endorsed]: Filed March 13, 1952.

[Title of District Court and Causes 23171-30473.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that defendant and cross-claimant, Lawrence Warehouse Company, may have to and including the 29th day of April within which to file its replying memorandum.

Dated: April 24, 1952.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ By RICHARD J. ARCHER,
Attorneys for Cross-Defendants
W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
/s/ By [Illegible]
Attorneys for Defendant and Cross-Claimant.

It is so ordered:

/s/ LOUIS E. GOODMAN,
Judge of the United States District Court.

[Endorsed]: Filed April 24, 1952.

[Title of District Court and Cause No. 30473.]

AMENDMENTS BY JAMES A. KENYON AND ADAMS SERVICE CO. TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AS PROPOSED BY LAWRENCE WAREHOUSE COMPANY

Now comes cross-defendants James A. Kenyon and Adams Service Co. and propose the following amendments to the Findings of Fact and Conclusions of Law as proposed by Lawrence Warehouse Company:

1. That lines 11, to and including 22 of the title page, be omitted to the effect that separate Findings of Fact and Conclusions of Law be filed in Civil Action No. 23171 and in Civil Action No. 30473.

2. That the following paragraphs be added, following paragraph III, page 3:

III-A.

"Prior to the leasing of the Ice Palace, Capitol Chevrolet Company stored tires delivered to it by Lawrence Warehouse Company and belonging to Defense Supplies Corporation in eleven different warehouses in Sacramento (Tr. of Trials of Cross-Claims, pp. 58, 59)."

III-B.

"On March 1, 1943, Lawrence Warehouse Company and Defense Supplies Corporation entered into an agreement for the storage of the tires at the Ice Palace (Tr. of Trial of Complaint in No. 23171, Ex. 1)."

3. That lines 16, to and including 18 of paragraph VI, page 4, reading as follows:

> "that said cross-claimant did not have knowledge of or consent to or participate in any of the said negligent acts of Capitol Chevrolet Company."

be omitted and the following substituted:

> "prior to the leasing of the Ice Palace, Lawrence Warehouse Company inspected the Ice Palace and knew of its fire hazards (Tr. of Trials of Cross-Claims, pp. 59, 65-69)."

4. That the following paragraphs be added following paragraph VI, page 4:

VI-A.

"Capitol Chevrolet Company did not desire to consolidate the storage of the tires in the Ice Palace but was directed to do so by Lawrence Warehouse Company (Tr. of Trials of Cross-Claims, pp. 59, 62)."

VI-B.

"Lawrence Warehouse Company employed and maintained watchmen for the Ice Palace (Tr. of Trials of Cross-Claims, pp. 48-49; Tr. of Trial of Complaint in No. 23171, p. 93 (193*)). The watchmen's duties included watching against fire hazards (Tr. of Trials of Cross-Claims, pp. 62-63; Tr. of Trial of Complaint in No. 23171, p. 174 (281))."

VI-C.

"No officer, director, agent or employee of Capi-

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*Numbers in parentheses indicate pages of Transcript on Appeal of No. 23171.

tol Chevrolet Company had any knowledge of the use by V. J. McGrew of an acetylene torch in the Ice Palace."

VI-D.

"The day before the fire V. J. McGrew commenced the use of an acetylene torch in the Ice Palace to the knowledge of the watchmen maintained and employed by Lawrence Warehouse Company. On the day of the fire said watchmen allowed V. J. McGrew to enter the Ice Palace, observed the hazardous location in which V. J. McGrew was using the acetylene torch and allowed V. J. McGrew to continue the use of said acetylene torch in the Ice Palace (Tr. of Trial of Complaint in No. 23171, pp. 105 (207), 109 (211), 172-174 (280-281))."

VI-E.

"On April 9, 1943, Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by Defense Supplies Corporation in this, that they negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said acetylene torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and said goods of Defense Supplies Corpo-

ration were consumed and totally destroyed by fire."

VI-F.

"The negligence of V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together to destroy the goods of Defense Supplies Corporation as aforesaid."

VI-G.

"By reason of said negligent acts of V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, Defense Supplies Corporation was damaged in the sum of $41,975.15."

5. That lines 13, to and including 22 of paragraph VIII, page 5, reading as follows, be omitted:

"That during said period Adams Service Co. has never maintained any office and has never done any business or exercised any corporate functions except to hold stock in other corporations in its name for and on behalf of said F. Norman Phelps and Alice Phelps. That from and after the said above-mentioned transfer, said transferees actively participated in the defense of the complaint of Defense Supplies Corporation against defendants and in the defense of the cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company in said action No. 23171."

6. That the following paragraph be added, following paragraph VIII on page 5:

VIII-A.

"From February 13, 1945, to and including February 15, 1945, the trial of the complaint of De-

fense Supplies Corporation in No. 23171 occurred. At the trial, it appeared that Capitol Chevrolet Company, a corporation, had been dissolved and that its assets had been distributed to its stockholders, James A. Kenyon and Adams Service Co., a corporation wholly owned by F. Norman Phelps and Alice Phelps."

7. That paragraph XII, page 7, reading as follows, be omitted:

"That it is not true that at all times prior to said above-mentioned fire, cross-claimant, Lawrence Warehouse Company, retained and maintained an agent, servant and employee in the capacity of a guard or watchman in and about the said 'Ice Palace' and that at said times the said guard or watchman was acting within the scope of such agency and employment, but, on the contrary, it is true that said guard or watchman on said premises, though ultimately paid for by plaintiff, Defense Supplies Corporation, was at all times prior to said fire acting under the control and direction of Capitol Chevrolet Company with respect to the admission of persons into said 'Ice Palace', and particularly with respect to the admission of the said V. J. McGrew into the said 'Ice Palace.' "

8. That the following Conclusions of Law be added, following paragraph II on page 12:

III.

"The Capitol Chevrolet Company having been long since dissolved when the cross-claim of Law-

ence Warehouse Company in No. 30473 was filed, the action against it should be dismissed."

IV.

"Capitol Chevrolet Co. and J.A.K. Co., not having assumed any of the liabilities of the Capitol Chevrolet Company or of its successors, are not liable for the obligations of Capitol Chevrolet Company and the action against them should be dismissed."

V.

"F. Norman Phelps and Alice Phelps are not, and neither of them is, the alter ego of Adams Service Co., and they did not, nor did either of them, assume the liabilities of Capitol Chevrolet Company or its successors, and the action against them should be dismissed."

Dated: San Francisco, November 7, 1952.

Respectfully submitted,

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

Attorneys for Cross-Defendants James A. Kenyon and Adams Service Co.

Acknowledgment of Service attached.

Lodged Nov. 7, 1952.

[Title of District Court and Causes 23171-30473.]

NOTICE OF MOTION

To: Herbert W. Clark, Richard J. Archer, Morrison, Hohfeld, Foerster, Shuman & Clark, James B. Isaacs, and Dempsey, Thayer, Deibert & Kumler, Attorneys for Cross-Defendants:

Please Take Notice that Cross-Claimant, Lawrence Warehouse Company, by its undersigned attorneys will bring the within Motion on for hearing before the above-entitled Court, Room 258, United States Post Office Building, Seventh and Mission Streets, City and County of San Francisco, on Wednesday, the 3rd day of December, 1952, at the hour of 10:00 o'clock a.m., on said day or as soon thereafter as counsel can be heard.

November 21, 1952.

/s/ WM. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant.

Acknowledgment of Service attached.

Motion of Cross-Claimant Lawrence Warehouse Company for an Order Vacating the Submission of the Above-Entitled Cause and to Re-Open the Same for Further Hearing and Evidence on the Question of the Liability of Certain Defendants.

Cross-claimant, Lawrence Warehouse Company,

respectfully moves that the above-entitled Court vacate the submission of the above-entitled cause as to cross-defendants F. Norman Phelps and Alice Phelps and re-open said cause for the purpose of taking further testimony therein and examining records in connection with the transactions between said cross-defendants and cross-defendant Adams Service Co., a corporation, upon the grounds that said orders, and each of them, will be in furtherance of justice.

Dated: November 21, 1952.

/s/ WM. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant, Lawrence Warehouse Company.

Memorandum of Points and Authorities in Support of the Foregoing Motion

The Court has jurisdiction, in its discretion, to re-open the case for further testimony.

Patterson v. National Life & Accident Ins. Co. (1950), 183 F. (2d) 745, 747 (6 Cir.)

St. Mary's Bank v. Cianchette (1951), 99 Fed. Supp. 994 (D. C. Me.)

Schick Dry Shaver v. General Shaver Corp. (1938), 26 Fed. Supp. 190 (D. C. Conn.)

We submit that in this instance the Court should

exercise its discretion to re-open this cause as requested for the following reasons:

1. The Court has indicated in its opinion that the matter of the liability of F. Norman Phelps and Alice Phelps is "inconclusive." Such liability can be made conclusive by the examination of records which were never presented at the trial or prior thereto although Mr. Phelps stated they would be given to cross-claimant's counsel voluntarily (Dep. pp. 6, 8, 13 and 20) and his counsel, though stating that cross-claimant's counsel should not rely on his own promise by refraining to take legal steps (Dep. pp. 29, 30), the fact remains that the records were not produced; the Court feels the matter inconclusive without them and, if not now produced voluntarily as promised by Mr. Phelps, the process of the Court may be used to secure them.

It is not the furtherance of justice to leave inconclusive that which can be made conclusive.

2. Secondly, if the Court will re-examine the Brief presented in this cause by counsel on behalf of all of the cross-defendants, it will be observed that their cause is argued without distinction in this regard. It is implicit in such argument that counsel for cross-defendants concluded that the cross-defendants if liable at all, were liable without distinction.

3. Thirdly, the answers to the interrogatories and the testimony clearly show:

(a) That James A. Kenyon as general partner and Adams Service Co. as limited partner of Capitol Chevrolet, a co-partnership, assumed the liabili-

ties, received the assets and carried on the business of the old Capitol Chevrolet Company, a corporation. (F.N.P. Dep. p. 13.)

(b) That Adams Service Co. was a corporation whose capital stock was wholly owned by cross-defendants F. Norman Phelps and Alice Phelps. (F.N.P. Dep. p. 5.)

(c) That when the new Capitol Chevrolet Co., a corporation, was formed on April 10, 1946, to take over the business and assets of Capitol Chevrolet Co., a co-partnership, the capital stock of new Capitol Chevrolet Co. was not issued to Adams Service Co., a corporation (which had assumed the liabilities of old Capitol Chevrolet Company) but was issued directly to cross-defendants F. Norman Phelps and Alice Phelps. (Capitol Chevrolet Co. Ans. to Interrogatories No. 1.)

We submit that such issuance of shares directly to F. Norman Phelps and Alice Phelps demonstrates that such persons were the alter ego of Adams Service Co. and it would be a fraud upon the creditors of Adams Service Co. not to disregard the corporate entity and hold cross-defendants F. Norman Phelps and Alice Phelps liable to cross-claimant Lawrence Warehouse Company.

4. Lastly, the depositions of both F. Norman Phelps and Alice Phelps (sole stockholders of Adams Service Co.) were taken and introduced in evidence at the trial.

Cross-defendant F. Norman Phelps testified that he thought the corporation had some assets but he did not know what they were. (F.N.P. Dep. p. 14.)

Cross-defendant Alice Phelps testified that she did not know whether such corporation had assets or had no assets. (A.P. Dep. p. 9.)

The only fair inference from such testimony is that such assets, if any, are too meagre to satisfy the large judgment which will be rendered herein. Certainly the sole stockholders of a corporation would be informed as to its assets if they were substantial.

It follows that the judgment herein should run not only against Adams Service Co. but also against cross-defendants F. Norman Phelps and Alice Phelps who have received upon the incorporation of new Capitol Chevrolet Co. in April of 1946 the assets of Adams Service Co. The corporation has been held because it expressly assumed the liabilities here in question. The Phelps should be held because they have received in an alter ego transaction the assets of Adams Service Co.

We respectfully submit that in furtherance of justice and in order to avoid a miscarriage of justice this Court should grant the motions and render its orders as therein requested.

Respectfully submitted,

/s/ WM. R. WALLACE,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant

Draft of Proposed Order

Good Cause Appearing Therefor, it is Hereby Ordered:

1. That the Order of Submission of the above-entitled cause be, and it hereby is, vacated as to cross-defendants F. Norman Phelps and Alice Phelps;

2. That said cause be set for further hearing on the cross-claim of Lawrence Warehouse Company against such cross-defendants on....., the .....day of....., 195...., at the hour of.....o'clock ..M., on said day.

.....

United States District Judge.

[Endorsed]: Filed Nov. 21, 1952.

[Title of District Court and Causes 23171-30473.]

NOTICE OF MOTION

To: Herbert W. Clark, Richard J. Archer, Morrison, Hohfeld, Foerster, Shuman & Clark, James B. Isaacs, and Dempsey, Thayer, Deibert & Kumler, Attorneys for Cross-Defendants:

Please take notice that Cross-Claimant, Lawrence Warehouse Company, by its undersigned attorneys will bring the within Motion on for hearing before the above-entitled Court, Room 258, United States Post Office Building, Seventh and Mission Streets, City and County of San Francisco, on Tuesday, the 16th day of December, 1952, at the hour of

2:00 o'clock p.m. on said day or as soon thereafter as counsel can be heard.

Dated: December 9, 1952.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant.

Acknowledgment of Service attached.

Motion for an Order Modifying Opinion And Order for Judgment

Cross-Claimant, Lawrence Warehouse Company, respectfully moves that the above-entitled Court make and enter its Order herein modifying the Opinion and Order for Judgment filed in this cause on the 12th day of September, 1952, by deleting therefrom:

> "The evidence is inconclusive as to whether F. Norman Phelps and Alice Phelps might be treated as the alter ego of the Adams Service Co. The action against them is therefore dismissed."

and substituting therefor:

> "Counsel for cross-defendants expressly conceded in their brief herein that if Adams Service Co. was liable, F. Norman Phelps and Alice Phelps are also liable. Judgment should, therefore, also be rendered against such cross-defendants in cause No. 30473."

Dated: December 9, 1952.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-claimant,
Lawrence Warehouse Company.

Memorandum of Points and Authorities in Support of the Foregoing Motion

On page 23, lines 9 and 10 of the Reply Brief filed herein on behalf of all Cross-defendants it is stated:

> "It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Co. is liable."

This Court has held Adams Service Co. liable. We submit that upon the basis of the foregoing contention of counsel for F. Norman Phelps and Alice Phelps, it should modify its Opinion and Order for Judgment as above requested.

Nelson vs. United States (1945), 149 F. (2d) 692 (9 Cir.)

Respectfully submitted,

/s/ W. R. WALLACE JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant.

[Endorsed]: Filed Dec. 9, 1952.

[Title of District Court and Cause No. 30473.]

ORDER PURSUANT TO RULE 54(b)

It is Hereby Ordered and Determined nunc pro tunc that there is no just reason for delay in entering the Judgment in the above-entitled action dated February 11, 1953; and

It is Further Ordered and Directed nunc pro tunc that said Judgment be entered.

Dated: San Francisco, March 3, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed March 3, 1953.

[Title of District Court and Cause No. 30473.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that each of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps, named above as cross-defendants, hereby severally appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 12, 1953.

Dated: San Francisco, March 10, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

[Endorsed]: Filed March 10, 1953.

[Title of District Court and Cause No. 30473.]

DESIGNATION BY JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS OF PORTIONS OF RECORD

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellants designate the following portions of the record to be contained in the record on appeal in the above-entitled action to the United States Court of Appeals for the Ninth Circuit:

1. The complete record and all the proceedings

and evidence in the action including but not limited to the following:

(a) The complaint of Reconstruction Finance Corporation;

(b) The answer of defendant James A. Kenyon;

(c) The answer of defendant Capitol Chevrolet Company;

(d) The answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants;

(e) Separate judgment against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company dated November 20, 1951;

(f) The answer of cross-defendant Capitol Chevrolet Company to cross-claim of Lawrence Warehouse Company;

(g) The answer of cross-defendant Capitol Chevrolet Co. to cross-claim of Lawrence Warehouse Company;

(h) The answer of cross-defendant James A. Kenyon to cross-claim of Lawrence Warehouse Company;

(i) The first amended answer to the cross-complaint of Lawrence Warehouse Company by cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.;

(j) Amendment to cross-claim of Lawrence Warehouse Company;

(k) Answer to amendment to cross-claim of Lawrence Warehouse Company by Capitol Chevrolet

Company, James A. Kenyon and Capitol Chevrolet Co.;

(l) Return of service of summons of cross-claim of Lawrence Warehouse Company and return of service of summons of amendment to cross-claim of Lawrence Warehouse Company;

(m) Motions to dismiss by cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps filed March 5, 1952;

(n) Answer to cross-complaint of Lawrence Warehouse Company by F. Norman Phelps and Alice Phelps;

(o) Answer to amendment to cross-claim of Lawrence Warehouse Company by F. Norman Phelps and Alice Phelps;

(p) Order for consolidation filed March 4, 1952;

(q) Order for judgment dated September 8, 1952;

(r) Motion of cross-claimant Lawrence Warehouse Company for an order vacating the submission of the above-entitled cause and to reopen the same for further hearing and evidence on the question of the liability of certain defendants;

(s) Motion for an order modifying opinion and order for judgment;

(t) Order amending order for judgment dated January 15, 1953;

(u) The findings of fact and conclusions of law filed February 11, 1953;

(v) The judgment dated February 11, 1953;

(w) The notice of appeal by the above-named appellants;

(x) All the docket entries in the above-entitled action;

(y) The order pursuant to Rule 54(b) dated March 3, 1953;

(z) This designation.

Dated: San Francisco, March 12, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1953.

[Title of District Court and Causes 23171-30473.]

DESIGNATION BY CROSS-CLAIMANT AND APPELLEE, LAWRENCE WAREHOUSE COMPANY, OF PORTIONS OF RECORD

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, cross-claimant and appellee, Lawrence Warehouse Company, hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled actions, as consolidated by Order of Court, to the United States Court of Appeals for the Ninth Circuit:

Items filed and numbered in action No. 23171 G alone:

1. Complaint of Defense Supplies Corporation;

2. Answer of Defendant Lawrence Warehouse Company and Cross-Claim Against Certain Defendants;

3. Answer of Capitol Chevrolet Company and Cross-Claim Against Certain Defendants;

4. Answer of Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company;

5. Opinion filed January 9, 1946;

6. Findings of Fact and Conclusions of Law, filed April 15, 1946;

7. Judgment, filed April 15, 1946;

8. Reporter's Transcript and all exhibits and evidence admitted and filed;

9. Mandate of the Court of Appeals;

10. First Amended Answer of Capitol Chevrolet Company To Cross-Claim, filed March 3, 1952;

11. Page 23, lines 5 to 10 of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"If liability on the part of Capitol Chevrolet Company exists, it is true that this liability was expressly assumed by James A. Kenyon and Adams Service Co., and their successors and privies except Capitol Service Co., and the new corporation. It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Co. is liable."

12. Page 1 of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"Answering Memorandum of Cross Defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps."

Items filed and numbered in action No. 30473 alone:

1. Complaint of Reconstruction Finance Corporation;

2. Answer of Defendant James A. Kenyon;

3. Answer of Defendant Capitol Chevrolet Co.;

4. Answer of Defendant Lawrence Warehouse Company And Cross-Claim Against Certain Defendants;

5. Return of Summons to Alice and F. Norman Phelps;

6. Answer of Cross-Defendant Capitol Chevrolet Co. to Cross-Claim of Lawrence Warehouse Company;

7. Answer of Cross-Defendant Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company;

8. Answer of Cross-Defendant James A. Kenyon to Cross-Claim of Lawrence Warehouse Company;

9. Separate Judgment against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew, and Capitol Chevrolet Company, dated November 21, 1951;

10. Assignment of Judgment, dated November 29, 1951;

11. Notice of Payment of Judgment And Claim to Contribution or Repayment, dated December 6, 1951;

12. First Amended Answer to Cross-Complaint, dated January 3, 1952;

13. Amendment to Cross-Claim of Lawrence Warehouse Company;

14. Answer to Amendment to Cross-Claim of Lawrence Warehouse Company (by Capitol Chevrolet Company, James A. Kenyon, and Capitol Chevrolet Co.);

15. Notice of Time and Place of Taking Deposition of Alice Phelps;

16. Answer to Amendment to Cross-Claim of Lawrence Warehouse Company by F. Norman Phelps and Alice Phelps;

17. Answer to Cross-Complaint of Lawrence

Warehouse Company by F. Norman Phelps and Alice Phelps;

18. Order Pursuant to Rule 54 (b);

19. Amendments by James A. Kenyon and Adams Service Co. to Findings of Fact and Conclusions of Law as Proposed by Lawrence Warehouse Company.

Items filed and numbered in both actions Nos. 23171 G and 30473:

1. Order For Consolidation, dated March 4, 1952;

2. Order For Judgment dated September 8, 1952;

3. Notice of Motion, Motion of Cross-Claimant Lawrence Warehouse Company For An Order Vacating The Submission of The Above-Entitled Cause And To Reopen The Same For Further Hearing and Evidence on The Question of The Liability of Certain Defendants, Memorandum of Points and Authorities in Support of The Foregoing Motion;

4. Notice of Motion, Motion For An Order Modifying Opinion and Order for Judgment, and Memorandum of Points and Authorities in Support of the Foregoing Motion;

5. Order Amending Order for Judgment, filed January 15, 1953;

6. Findings of Fact and Conclusions of Law, signed February 11, 1953;

7. Judgment, dated February 11, 1953, entered February 12, 1953.

8. Memorandum of Court Upon Signing of Judgment, dated February 11, 1953;

9. Notice of Appeal by Clerk, District Court, dated March 11, 1953;

10. Stipulation and Order Extending Time to File Opening Brief of Lawrence Warehouse Company until March 25, 1952;

11. Reporter's transcript and all exhibits and evidence admitted in trial of cross-claims 23171 G and 30473, including but not limited to Interrogatories Propounded by Cross-Claimant, Lawrence Warehouse Company, to Cross-Defendant Capitol Chevrolet Co., Interrogatories Propounded by Cross-Claimant, Lawrence Warehouse Company, to Cross-Defendant Capitol Chevrolet Company, Interrogatories Propounded by Cross-Claimant, Lawrence Warehouse Company, to Cross-Defendant James A. Kenyon, and the separate Answers thereto filed by each of said cross-defendants including exhibits attached to said Answers.

12. Stipulation and Order dated April 24, 1952;

13. Designation by Cross-Claimant and Appellee, Lawrence Warehouse Company, of Portions of Record, Proceedings and Evidence to be Contained in Record on Appeal.

Dated: March 25, 1953.

/s/ W. R. WALLACE JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant and Appellee.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1953.

[Title of District Court and Causes 23171-30473.]

NOTICE OF MOTION TO STRIKE OR CONSOLIDATE THE DESIGNATIONS OF CROSS-DEFENDANTS AND THEIR NOTICES OF APPEAL.

To: Cross-Defendants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps and to Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, James B. Isaacs, Dempsey, Thayer, Deibert & Kumler:

You, and each of you, will please take notice that on Tuesday, the 7th day of April, 1953, at 10:00 o'clock a.m., of said day, or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Louis E. Goodman, Room 258, United States Post Office Building, Seventh and Mission Streets, City of San Francisco, Cross-Claimant, Lawrence Warehouse Company, will move the Court for an order striking the Designation by James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps of Portions of Record, Proceedings and Evidence to be Contained in Record on Appeal and the like Designation by Capitol Chevrolet Company, or, in the alternative, for an order consolidating said Designations.

Cross-Claimant, Lawrence Warehouse Company, will at the same time move said Court for an order striking the Notice of Appeal of James A. Kenyon, Adams Service Co., F. Norman Phelps, and Alice

Phelps and the Notice of Appeal of Capitol Chevrolet Company, or, in the alternative, for an order consolidating said Notices of Appeal. Said motions will be made on the ground that said actions were ordered consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and were therefore merged into one action for all purposes, including appeal from the judgment therein entered; that upon separate appeals from one judgment, there can only be one record on appeal.

Dated: March 25, 1953.

/s/ W. R. WALLACE JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant and Appellee.

Memorandum of Points and Authorities
In Support of Motions

Nat. Union Fire Ins. Co. vs. Ches. & O. Ry. Co. (1933), 4 F. Supp. 25.

Bley vs. Trav. Ins. Co. (1939), 27 F. Supp. 351.

Barker vs. Hartford Fire Ins. Co. (1951), 100 F. Supp. 1022.

George vs. Leonard (1949), 84 F. Supp. 205, 208, reversed on other grounds 178 F. 2d 312, cert. den. 339 U.S. 965, 94 L. Ed. 1374.

1 C.J.S. 1341.

Rule 75(k), Fed. Rules Civ. Proc.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1953.

[Title of District Court and Causes 23171-30473.]

ORDER RE MOTION TO STRIKE DESIGNATIONS IN RECORD ON APPEAL

The above entitled cases were consolidated for trial. A single judgment disposing of all the issues in both cases was entered.

Certain of the defendants have appealed. The manner of appeal and of making up the record has caused some differences between the parties. A motion to strike or consolidate designations made by cross-defendants as well as their notices of appeal has been presented and argued.

I am convinced that this is "Much Ado About Nothing." As long as a "true"[1] and proper record goes to the Appellate Court, either side will be in a position to urge any relevant contentions upon the appeal.

Consequently, it is ordered that a single record on appeal containing all the matters designated by the parties shall be prepared in respect to the sev-

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[1] Rule 75(h) F.R.C.P.

eral appeals taken from the judgment entered in the consolidated action. Rule 75 (k) F.R.C.P.

Dated: April 15, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 15, 1953.

[Title of District Court and Causes 23171-30473.]

SUPPLEMENTAL DESIGNATION BY CROSS-CLAIMANT AND APPELLEE, LAWRENCE WAREHOUSE COMPANY

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Cross-claimant and appellee, Lawrence Warehouse Company, hereby designates the following additional portions of the record to be contained in the record on appeal in the above-entitled actions, as consolidated by Order of Court, to the United States Court of Appeals for the Ninth Circuit:

1. Notice of Motion to Strike or Consolidate the Designations of Cross-Defendants And Their Notices of Appeal, filed March 26, 1953;

2. Order Re: Motion To Strike Designations In Record on Appeal, dated April 15, 1953;

3. Supplemental Designation by Cross-Claimant

and Appellee, Lawrence Warehouse Company, of Portions of Record To Be Contained In Record On Appeal, dated April 16, 1953.

Dated: April 16, 1953.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant and Appellee.

Acknowledgment of Service attached.

[Endorsed]: Filed April 17, 1953.

[Title of District Court and Causes 23171-30473.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals (or true copies thereof) filed in the above-entitled cases, and that the same constitute the record on appeal herein as designated by the respective parties to the appeal:

Complaint (No. 23171).

Answer of defendant, Capitol Chevrolet Company, and Cross-claim against Clyde W. Henry and Constantine Parella, (No. 23171).

Answer of Cross-defendant, Constantine Parella to cross-complaint (No. 23171).

Answer of defendant Lawrence Warehouse Co. and Cross-claim against Clyde W. Henry, Constantine Parella and Capitol Chevrolet Co. (No. 23171).

Answer of Cross-defendant, Constantine Parella to cross-complaint of Lawrence Warehouse Company. (No. 23171).

Answer of Cross-defendant Capitol Chevrolet Company to cross-complaint of Lawrence Warehouse Co. (No. 23171).

Answer of Cross-defendant Clyde W. Henry to cross-complaint of Lawrence Warehouse Company (No. 23171).

Answer of Cross-defendant Clyde W. Henry to cross-complaint of Capitol Chevrolet Co. (No. 23171).

Copy of notice that case will appear on calendar to be set for trial (No. 23171).

Notice of time and place of trial (No. 23171).

Opinion filed January 9, 1946 (No. 23171).

Minutes of February 20, 1946 (No. 23171).

Findings of fact and conclusions of law filed April 15, 1946 (No. 23171).

Judgment filed and entered April 15, 1946 (No. 23171).

Mandate of United States Court of Appeals, Ninth Circuit, (No. 23171).

First amended answer of Capitol Chevrolet Company to cross-claim of Lawrence Warehouse Co. (No. 23171).

Notice of motion by Capitol Chevrolet Co. to strike evidence (No. 23171).

Complaint on judgment (No. 30473).

Summons issued April 12, 1951 and filed on return April 24, 1951 (No. 30473).

Answer of Capitol Chevrolet Co. to complaint (No. 30473).

Answer of James A. Kenyon to complaint (No. 30473).

Answer of Lawrence Warehouse Co. to complaint and Cross-claim against Capitol Chevrolet Company, a corporation, James A. Kenyon and Capitol Chevrolet Co., a corporation (No. 30473).

Answer of Capitol Chevrolet Company to cross-claim (No. 30473).

Answer of Capitol Chevrolet Co. to cross-claim (No. 30473).

Answer of James A. Kenyon to cross-claim (No. 30473).

Separate judgment against defendants, Lawrence Warehouse Co., Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, filed November 20, 1951 (No. 30473).

Interrogatories propounded by Cross-Claimant Lawrence Warehouse Co. to Cross-defendant, Capitol Chevrolet Co. (No. 30473).

Interrogatories propounded by Cross-Claimant Lawrence Warehouse Co. to Cross-defendant, Capitol Chevrolet Company (No. 30473).

Interrogatories propounded by Cross-Claimant Lawrence Warehouse Co. to Cross-defendant, James A. Kenyon.

Answers to interrogatories propounded to Capitol Chevrolet Co. (No. 30473).

Answers to interrogatories propounded to Capitol Chevrolet Company (No. 30473).

Answers to interrogatories propounded to James A. Kenyon (No. 30473).

Assignment of judgment (No. 30473).

Notice of payment of judgment and claim to contribution or repayment (No. 30473).

First amended answer to cross-complaint (No. 30473).

Amendment to Cross-claim of Lawrence Ware-. house Co. (No. 30473).

Summons issued February 15, 1952 on Cross-claim (No. 30473).

Notice of time and place of taking deposition of Alice Phelps (No. 30473).

Answer to amendment to Cross-claim (No. 30473).

Motion to dismiss Cross-Claim (No. 30473).

Answer of F. Norman Phelps and Alice Phelps to Cross-complaint (No. 30473).

Answer of F. Norman Phelps and Alice Phelps to amendment to Cross-claim (No. 30473).

Proposed amendments by James A. Kenyon and Adams Service Co. to findings of fact and conclusions of law as proposed by Cross-Claimant (No. 30473).

Answering memorandum of Cross-defendants, filed April 11, 1952 (No. 23171).

Order consolidating actions for trial.

Stipulation and order extending time of Cross-

Claimant, Lawrence Warehouse Co. to file opening brief.

Stipulation and order extending time of Cross-Claimant, Lawrence Warehouse Co. to file replying memorandum.

Order for judgment, filed Sept. 12, 1952.

Motion by Lawrence Warehouse Co. for an order vacating the submission of case and to re-open the same for further hearing.

Motion for order modifying opinion and order for judgment.

Order amending order for judgment.

Findings of fact and conclusions of law.

Judgment filed February 11, 1953 and entered February 12, 1953.

Order pursuant to Rule 54(b) (No. 30473).

Docket entries (No. 23171).

Docket entries (No. 30473).

Notice of appeal (No. 23171).

Notice of appeal (No. 30473).

Copy of Clerk's notice of filing notices of appeal.

Notice of motion of Appellee to strike or consolidate the designations of Appellants.

Order re motion to strike designations in record on appeal.

Order extending time for filing record on appeal (No. 23171).

Order extending time for filing record on appeal (No. 30473).

Designation by Capitol Chevrolet Company of portions of record to be contained in record on appeal (No. 23171).

Designation by James A. Kenyon, et al of portions of record to be contained in record on appeal (No. 30473).

Designation by Appellee of portions of record to be contained in record on appeal.

Supplemental designation by Appellee of additional records to be contained in record on appeal.

Reporter's transcript, Feb. 13, 14, 15, 1945.

Reporter's transcript, March 6, 1952.

Reporter's transcript, January 8, 9, 1952.

Deposition of Alice Phelps.

Deposition of F. Norman Phelps.

Plaintiff's Exhibits 1 to 14 (Case No. 23171).

Defendants' Exhibit A and B (Case No. 23171).

Cross-claimant's Exhibit 1.

Cross-defendants' Exhibits A to F.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 15th day of May, 1953.

[Seal] C. W. CALBREATH,
Clerk.

[Title of District Court and Cause No. 30473.]

REPORTER'S TRANSCRIPT

January 8 and 9, 1952

Before Hon. Lewis E. Goodman, Judge.

Appearances: Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., and John R. Pascoe, Esq., representing Lawrence Warehouse Corp., Cross-Claimant. Morrison, Hohfeld, Foerster, Schuman & Clark, by Herbert W. Clark, Esq., and Richard J. Archer, Esq., and James B. Isaacs; Dempsey, Thayer, Deibert & Kumler, representing James A. Kenyon, Capitol Chevrolet Company and Capitol Chevrolet Co., Cross-Defendants. [2*]

The Clerk: RFC versus the Capitol Chevrolet Company, pre-trial conference. Will respective counsel please state their appearances for the record?

Mr. Garrison: Maynard Garrison and Mr. John R. Pascoe of Wallace, Garrison, Norton & Ray, representing Lawrence Warehouse Corporation.

Mr. Archer: Richard J. Archer and Herbert W. Clark of Morrison, Hohfeld, Foerster, Schuman & Clark, and James B. Isaacs; Dempsey, Thayer, Deibert & Kumler for the cross-defendants James A. Kenyon, Capitol Chevrolet Company and Capitol Chevrolet Co.

The Court: I should like the record to show

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

that counsel consulted with me in chambers the other day concerning this matter, the case having been set for trial today, in view of the statements that were made, particularly to the effect that one of the lawyers was coming from Los Angeles; though I was engaged in the trial of a jury case, I thought that we might possibly dispose of the matter at a pre-trial conference or at least determine whether we could or not, and it was for that reason I set it for this hour so that counsel from out of town could be accommodated, and if we are not able to conclude what we have to do this afternoon, we can finish it up tomorrow, because I anticipate that the case I have on will go to the jury possibly by noontime tomorrow.

Mr. Archer: That is satisfactory with us, your Honor. [3]

Mr. Garrison: Your Honor will recall that we were here once before when the Defense Supplies Corporation of the Reconstruction Finance Corporation was among us, and we did not get completed with this phase of the pre-trial conference; it seemed to me with some of the developments that occurred in connection with the written interrogatories that were submitted and the answers that we ought to have another, and so today I would like to in connection with this pre-trial conference move your Honor for a summary judgment against certain of the defendants, and I think the best way to get this thing before us and in our mind is for me to make a short statement of some of the background of it. I know your Honor has it in mind,

but in order that we focus our thinking right on the specific points I have in mind, I would like to take just a few minutes to review the factual situation.

Your Honor will recall that this all originated in connection with a rubber conservation program of the Government called the Idle Tire Program, and as a part of that the Government made arrangements with various persons to warehouse these tires that were brought in and submitted by the public, and among those persons was the Lawrence Warehouse Corporation. That corporation made what I might refer to as a master contract with the Defense Supplies Corporation and agreed to in certain cities handle the warehousing for the Government, and the Lawrence Warehouse Corporation, pursuant to that contract [4] with the Defense Supplies, made agency contracts with others in the various communities where Lawrence did not have facilities for the warehousing of those tires, and among those contracts was one made with the Capitol Chevrolet Company in Sacramento.

The contract of the agency made between the Defense Supplies and Lawrence provided that the Lawrence Warehouse should have the duties of a general warehouseman to the Defense Supplies in respect to these tires, and in fact the language says, "Your general responsibility for the care and protection of the tires will be limited to such care as required by law governing warehouses in your state and to the exercise of ordinary care on your part."

The contract of the agency between Lawrence and

Capitol was one made after Capitol had been approved by the Defense Supplies and that contract provided, first, in paragraph 2—and incidentally, the contract is in the transcript which will be available to your Honor—first, to furnish suitable storage space for the storage of such tires and tubes as may be delivered to agent (that is, Capitol) to the total available capacity of agent.

Paragraph 3 provided, to store and safeguard the storage of such tires and tubes as are received by agent Capitol.

Paragraph 7, agent to agree that he will, at its own cost and expense, keep said demised premises in good order and [5] repair, and that the principal shall not be called upon (the principal being Lawrence) or required to make any repairs of any kind or nature either upon or to said demised premises.

8. Capitol agrees to indemnify the principle, Lawrence, against loss or damage resulting from a failure on the part of the agent to perform any of the duties or obligations above set forth.

Now, then, Capitol was actually a Chevrolet dealer in Sacramento and it did not have warehouse facilities sufficient for this tire program, as it ultimately developed. So it went out and leased a building near Sacramento, which I believe is referred to as the Ice Palace, a defunct ice skating rink, probably, first having that building approved by the Defense Supplies for use as a warehouse for this purpose, and executed a lease with the owners of that property, a Mr. Clyde W. Henry and Mr. Constantine Parella, and that lease was in the usual

form, and it provided that Capitol would maintain the property, that it would avoid violations of law with respect to fire, and keep the property susceptible to insurance coverage, and so forth; in fact, established the relationship with the owner of landlord and tenant.

The actual carrying out of the storage and the warehousing was under very close and rigid supervision of Defense Supplies. They sent inspectors, first with respect to the warehouse, and secondly with respect to the manner of handling the tires.

They provided elaborate instructions on storing, stacking, counting and so forth, and the arrangements between the Defense Supplies and Capitol were very complete and are all a matter of record. So complete were they that the Defense Supplies instructed Capitol that under no circumstances were they to permit anyone to enter the premises.

That was probably as well from a security standpoint as from any other, we being in a major war at that time, and they also in connection with those rigid instructions gave to Capitol the names of persons who might be permitted to enter, and it is interesting to note that of that group of seven or eight persons specified, not even Lawrence Warehouse was permitted in those premises, either Lawrence or any of its agents or employees.

When this warehouse was partially filled with tires, one of the owners, I believe Mr. Henry, had occasion to want to remove some——

The Court: I think you need not necessarily go over this. I think what you stated is included in

the statement of facts in the opinion in the original case, if I remember correctly.

Mr. Garrison: Yes, it is. I will accelerate. I wanted to bring us up to that date. At any rate, the fire occurred by reason of the man's use of an acetylene torch. The point I wanted to make in that connection was that he was in there by securing permission from Capitol against the instructions [7] of the Defense Supplies Corporation.

The Court: May I interrupt you to ask you this question: Is it your contention in connection with the cross-complaint here that the Capitol Chevrolet Company had the same obligations of warehousemen as the Lawrence Company had to the Defense Supplies Corporation?

Mr. Garrison: Exactly, exactly, and in addition they agreed and contracted with us to hold us harmless from any loss by reason of their negligence. I read that language. That is paragraph 8 of their contract with us: "to indemnify the principal Lawrence against loss or damage resulting from a failure on the part of the agent Capitol to perform any of the duties or obligations set forth above." And those duties or obligations are to furnish suitable storage space for the storage of such tires and tubes as may be delivered to it, to store and safeguard the storage of such tires and tubes as are received by Capitol, you see.

The Court: And you contend under the facts as they were found by the court in the original case as a matter of law that would be a breach on the

part of the Capitol Chevrolet Company of those provisions of that contract?

Mr. Garrison: The Court held, and the Circuit Court of Appeals in affirming your decision said that the fire resulted from the commission of the man's entry without supervision or protection, and, of course, to us it was not only an act of [8] negligence under our contract to safeguard the property but also it created in us a right to be indemnified under this "hold harmless" agreement with Capitol. There isn't any question under the evidence, as approved by the Circuit Court of Appeals in its affirming opinion, that the fire was caused by the torch and in no other way.

The Court: It is your contention, then, that this is a matter of law as to whether there is a liability?

Mr. Garrison: Yes. This is all before us. It is in the record. And as your Honor knows, you reserved this cross-complaint or counter-claim for consideration at a later date, which is now.

The Court: I did not do that of my own volition. As I recall it, all the parties wanted that done.

Mr. Garrison: That is right. That is right. It was stipulated, and your Honor made that order. I think now to keep this record straight I ought to move your Honor for a consolidation of that cross-claim with the present action which has been filed.

The Court: Is there a new action?

Mr. Garrison: Yes, there is a new action filed. You see, the Defense Supplies sued on the judgment, and in that action we cross-claimed in the same kind of a case that we brought in the original

cross-claim, but we named other defendants as well. So we do have two cross-claims, you see. [9]

The Court: Is it your point that the factual matters upon which rest the basis of your liability on the part of the Chevrolet Company and the Lawrence Warehouse Company cannot be relitigated in the present suit but only the question of law?

Mr. Garrison: No, I think it can be relitigated in either suit, but because we want to use the transcript and exhibits in the first case, and because Your Honor specifically reserved that cross-claim, you see, it seems to me simply to be a matter of good procedure——

The Court: Of course, the liability of the Capitol Chevrolet Company and the Lawrence Warehouse Company to the Reconstruction Finance Company is res judicata.

Mr. Garrison: Yes, that is true, we do not raise that issue, and that won't be involved. This is merely the liability between Lawrence and Capitol.

The Court: How could you litigate the facts except only to the extent as it concerns the liability of the Chevrolet Company and the Lawrence Warehouse?

Mr. Garrison: That is right. I do not mean to agree with your Honor's comment that it is res judicata. It would be res judicata between Lawrence Warehouse and Defense Supplies, say, but it is not necessarily res judicata as between Lawrence and Capitol. That is a point we need not get into now. Later on we might talk about that. [10]

The Court: The Court found, and the higher

court sustained the finding, that there was a factual basis for liability on the part of both of the defendants and also another defendant, as I remember, the fellow who had the blow torch.

Mr. Garrison: Yes, there is no question about that, your Honor, and that point is not in dispute. The basis for that liability, as your Honor recalls as well as I, was the agency relationship between Capitol and Lawrence under this contract I am just talking about. The Circuit Court of Appeals in its affirming opinion said, "While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency agreement fully support this conclusion."

You see, they were our agent and we are bound by their negligence. Now we are here today seeking in an action indemnification from our agent under two statements of our cause: first, that there is well-known and implied obligation on the part of any agent to so conduct himself that his principal will not be held liable for his negligence; and secondly, under this specific written contract that I have just referred to, in which the Capitol Chevrolet Company agreed to hold us harmless for any loss by reason of their negligence. So that is our case. [11]

The Court: It is really the last condition that you have read that is the basis of your claim.

Mr. Garrison: We are in the fortunate position of having a specific written contract with Capitol, but even if we did not have, the law gives us one,

because there is an implied duty and a liability implied in the law that the agent shall be responsible to his principal for his negligence. But we do not need to worry about that because here it is spelled out in so many words. So there we are. We are now at the point where everything has been introduced, all of these contracts are in the evidence, testimony has been given, and the Court has already ruled on that evidence, to the effect that the fire resulted from the use of the torch. The evidence shows a violation of the instructions by the agent Capitol. And there isn't any issue of fact here today that needs to be tried insofar as our cause of action against Capitol Chevrolet Company is concerned. When we get into the question of the other defendants, we have some other problems, and I think the best way to do it would be for us to consider, first, whether or not we are entitled to a judgment, a summary judgment against somebody.

The Court: Against the Capitol Chevrolet.

Mr. Garrison: Yes, and then let me take up separately the question of my theory of why I think we can hold the others.

The Court: Let me ask you one more question and I won't bother you any more: Would there be any liability on the part [12] of the Capitol Chevrolet to the Lawrence Warehouse absent the indemnification provision in that agreement?

Mr. Garrison: Yes.

The Court: On what theory is that?

Mr. Garrison: Implied in law.

The Court: Liability as an agent?

Mr. Garrison: If I am negligent, you may sue me for negligence. We have a great abundance of authority on that. But we do not need to worry about that because it is spelled out in so many terms.

Now, they have answered our cross-claim here with a multitude of defense, literally and figuratively. They have cited, I think, every statute of limitations in the Code, and I am at a loss to say much about that because I can't conceivably see any application of them. When you have in mind, as we wish your Honor will, that we are seeking recovery by reason of this indemnity arrangement to which we have just referred, that indemnity arrangement, that contract by Capitol was to hold us harmless against loss. Now, we did not suffer any loss until we paid the judgment, and that was when the statute first could conceivably start to run. I believe in their answer they make reference to the fact that the judgment became final back in 1946, probably based on the comment that the Supreme Court made that the original judgment should be the one that was effective. [13]

The Court: In the original suit you had a cross-complaint, too?

Mr. Garrison: Yes, sir.

The Court: In that you claimed if there was liability, it was on their part as agent as well as under the indemnification agreement?

Mr. Garrison: Yes.

The Court: So while the statutory point might conceivably be good in the second suit, it would not be good in the first suit.

Mr. Garrison: Oh, yes, it would.

The Court: I misstated myself. While the limitation point might possibly go good in the second suit, it would not be good in the first suit.

Mr. Garrison: That is right; no, it could not conceivably be good. They also state that we did not state a cause of action, and they also allege that we were guilty of independent negligence, that we cannot recover against our agent because we were negligent independently. There is no evidence of that any place in the record. I would say it is our theory that the case is now at issue and needs no further evidence, and your Honor can decide it on my motion for summary judgment, but I think Mr. Clark should elaborate on his theory that we have not stated a cause of action and on his theory that the statute of limitations applies. I am not able to get any guaranties [14] with that defense. If you think it is wise, if you will consolidate that first cross-claim that was held in abeyance with our present cross-claim so they may be considered by your Honor together and as one action, then that is all I have to say about the subject.

The Court: The Supreme Court certainly made a lot of trouble for the poor trial judge by requiring another suit to be filed in this case.

Mr Garrison: That was completely without understanding, why they had to file a suit on that judgment.

The Court: It is done.

Mr. Garrison: It is done, but your Honor's decision in the case was confirmed by the Circuit Court

of Appeals on the question of the facts. The other thing went off on an entirely different tack, that we were not concerned with in the trial of the case at all.

Does your Honor agree that the first cross-claim and this cross-claim should be brought together for the purpose of consideration by your Honor whenever you get around to it?

The Court: The other side may want to be heard on that. You want to take up that phase of the matter before you take up the question of the other defenses?

Mr. Garrison: It seems logical.

The Court: Is that agreeable with you, gentlemen?

Mr. Clark: If the Court will hear Mr. Archer, who handled [15] this.

Mr. Archer: If it please the Court, in discussing this case, with reference to the background, it is the cross-defendant's position that the judgment in 23171 is the final pronouncement in that case. The pertinent parts of that judgment are as follows:

> "Now, therefore, it is ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of——"

whatever was inserted there. It is our position that it was a joint and several judgment.

The Court: That was the original judgment.

Mr. Archer: That is right, in 23171. The pleadings in the present action are brought on that judgment. It is our contention the fact that it was given jointly and severally precludes any recourse to the evidence and the record on appeal or to the opinion. In any event, the record on appeal, the opinion of the Appellate Court, and the opinion of the trial court, while informative, certainly are not part of the record in determining the judgment in the case. Furthermore, if the [16] record in No. 23171 is looked to, it will be seen that nowhere in that record is the question of the liability of the Lawrence Warehouse Company, on the theory of respondeat superior, even discussed. It is not mentioned in the pleadings. Lawrence Warehouse Company filed interrogatories after their motion for a more definite statement was denied, or a bill of particulars, and the first five interrogatories were directed to obtain a definition of what the plaintiff was driving at as to the Lawrence Warehouse's negligence, and in every one of those interrogatories it said "the liability of Lawrence Warehouse as such"—no mention of respondeat superior. As I said, the pleadings state the same thing.

Now, the findings of the Court: I would like to invite the Court's attention to finding No. 5 and finding No. 6. No. 5 reads as follows:

"On April 9th, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company

failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner and to provide adequate protection for said premises and said goods against the use of [17] said torch and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises of plaintiff and said goods were consumed and totally destroyed by fire."

And then finding No. 6:

"The negligence of defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods as aforesaid."

There is no finding at all of respondeat superior, scope of the agency, or acting within the scope of the agency.

In this respect I would like to invite the Court's attention to a case of the Ninth Circuit, Rothschild against Marshall, 44 Federal 546. That case was a simple case involving two suits under the Longshoremen's and Harbor Workers' Compensation Act. In the first case the opinion of the District Court had said,

> "In both cases the Deputy Commissioner will proceed accordingly,"

but his decree in the case in which he rendered

that opinion set aside and enjoined the enforcement of the award which was made by the Commissioner. Pursuant to the opinion the Commissioner proceeded to take a second hearing, and then it [18] was attempted to be enjoined again, and on appeal the Court of Appeals for the Ninth Circuit held that there was no jurisdiction, in spite of the language in the Court's opinion for the Commissioner to hold a second hearing. The Court said:

"The short, and we think conclusive, answer to this insistence is that courts in determining the rights of parties in litigation before them speak through their judgments and decrees, and where a judgment or decree is plain and unambiguous in its terms, it may not be modified, enlarged, restricted, augmented, or diminished by reference to other documents, including the opinion pursuant to which the judgment or decree in question is entered. The decree of a court of equity is the final and solemn definition of the rights of the parties to the controversy with which the decree deals, and the decree—not the opinion—is the instrument through which the Court gives expression to its conclusions.

" 'The opinion of the Judge is the expression of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused. The judgment or decree is the fiat or sentence of the law, determining the matter in controversy, in concise technical terms, which must [19] be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts de-

pend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them.' "

Now, this case is, as has been followed consistently, and I think that the general rule—I don't think its judgments or findings are like any contract—if they are clear and unambiguous on their face, they can't be counter to the——

The Court: Your point is, Mr. Archer, with the judgment—that was a joint judgment, finding a joint or concurrent liability of negligence on the part of defendants, once the judgment is paid, neither party can pursue the other party.

Mr. Archer: Our relying on the judgment, the pleadings in this case, there is no doubt about the pleadings in this second action relying on the judgment in 21371, that is to say, liability was imposed for that reason, and furthermore, I think the law generally is that that finding in that case——

The Court: Well, would it make any difference in this case, Mr. Archer, that at the time of the litigation of the original suit that there was reserved for future determination the cross-complaint?

Mr. Archer: Well, of course, you are referring —would it make any difference in the second case?

The Court: I mean, would it make any difference with respect to the point you now made as to the judgment that there was reserved for consideration the issue raised by the cross-complaint and that was undetermined in the action in which the judgment was rendered.

Mr. Archer: No, I don't think it would make

any difference because the cases which support this ruling, this ruling of law which I am expounding, are cases where it has arisen in entirely separate actions where an indemnitor wasn't even a party on the first action and the indemnitee comes in and says, "Here is this judgment which I had to pay", and the courts uniformly say, when they look at that judgment and find a finding of negligence on the part of the indemnitee, that the judgment precludes you, you have to rely on the judgment to establish your liability. If there was no judgment rendered, we certainly wouldn't be liable.

The Court: Suppose the original action was only against the Lawrence Warehouse Company?

Mr. Archer: I say it is the same situation.

The Court: Then if there was an indemnitor, wouldn't the indemnitor have a right to—suppose that the Lawrence Warehouse had a contract with the Capitol Chevrolet Company protecting it against any negligence of the agent, and the Government in this case elected only to sue the——

Mr. Archer: That is right. [21]

The Court: ——Lawrence Warehouse Company, and they recovered a judgment against the Lawrence Warehouse Company upon the facts which, in the record, would show that the actual tort was committed by the agent of the Lawrence Warehouse Company; but of course, the agent, not being before the Court, the judgment would be only against the Lawrence Warehouse Company. Would you say that the Lawrence Warehouse Company was liable

because of its tort debar it from relying on an indemnity agreement with its agent?

Mr. Archer: Yes, your Honor, because they have to rely on the judgment to begin with to show any liability. In the same way the indemnitor is bound.

The Court: Suppose the Capitol Chevrolet Company says in the indemnity agreement, "Now, I will protect you against liability as a result of any tortuous act on my part, and if anybody gets a judgment against you I will pay it."

Mr. Archer: That's right.

The Court: Now, judgment is obtained against the Lawrence Warehouse Company, which is based upon a finding that the Lawrence Warehouse Company was guilty of negligence. Would that debar the indemnitee from, the Lawrence Warehouse Company, the right to sue on that indemnity agreement?

Mr. Archer: The agreement, the original agreement did cover negligence of the Lawrence Warehouse Company, or didn't—our agreement covers only negligence of Capitol Chevrolet [22] Company.

The Court: Maybe I haven't made myself quite clear. Let's assume the Lawrence Warehouse Company had made the agreement for the storage of these tires with the Defense Supplies Corporation.

Mr. Archer: That's right.

The Court: They employ an agent, the Capitol Chevrolet Company, and in that agreement they had a provision whereby the Chevrolet Company agreed to hold the warehouse company harmless from any liability by virtue of their negligence and

pay any claim that might be legitimized by court proceedings against them.

Mr. Archer: That's right.

The Court: And the Defense Supplies Corporation then sued the Lawrence Warehouse Company alone.

Mr. Archer: That's right.

The Court: And recovered a judgment against them.

Mr. Archer: That's right.

The Court: Now, wouldn't the Lawrence Warehouse Company be in a position to say, "I have a judgment against me; I have to pay it. Now, under our indemnity agreement, inasmuch as it was your fault in the matter and you have agreed to indemnify me, I want you to pay it."

Wouldn't they have that course of action?

Mr. Archer: That would be their course of action, but they [23] would, nevertheless they would be relying on the judgment to establish it, and our position is that they have to take the judgment for good or for bad.

The Court: Well, it is a judgment against the Lawrence Warehouse Company which they paid.

Mr. Archer: That is right.

The Court: I notice also that there is an assignment of that in this record, that the Government assigned the judgment to the Lawrence Warehouse Company. I don't know whether that has any significance.

Mr. Archer: That's superficial; there are many cases which say—that is just a way of trying to get

a contribution from a joint tort feasor, and the law is contrary on that point. That is mere subterfuge.

The Court: It is your point because the Chevrolet Company was a party to this suit and the judgment was against both of them, that that debars the Warehouse Company from suing on the indemnity agreement?

Mr. Archer: I make both points, your Honor. I would say even if Capitol Chevrolet Company was not a party to this action, that judgment, relied on as it is relied on by Lawrence Warehouse Company, with a finding of Lawrence Warehouse Company's negligence precludes Lawrence Warehouse Company from showing that it was not in fact itself negligent even though——

The Court: I can understand your point if you are relying [24] on the regular orthodox rules about joint tort feasors; in other words, if Smith and Jones are sued, why, then Smith can't turn around afterwards and try to collect from Jones; but is that true, is the case you have cited from 44 Federal Second, would that apply to a case where there was an indemnity agreement? That is what is bothering me.

Mr. Archer: There is a Califorina case precisely on the principle of agent relationship, Salter against Lombardi, 116 Cal. App. 602, and in that case there was a finding in the lower court—incidentally, this case also was a case where they tried to buy the judgment. In this case they allowed it because it was the attorney that bought it, since he was under no obligation to buy it that it wasn't in fact contri-

bution between joint tort feasors, but on the principal point of the respondeat superior.

Well, this was the case in which they said:

"With appellant's basic premise we are agreed that the judgment is one against joint tort feasors. His motion for full satisfaction was made in part upon the record and files of the action. This alys before us the findings of fact upon which the judgment was founded, where it is finally adjudicated, so far as this case is concerned that 'defendants by themselves, their agents, employees and servants' acted so negligently that plaintiff had judgment. [25] In the face of this finding, plaintiff's successor in interest may not be heard to say that the tort was solely that of defendant Lewis, and that Lewis' co-defendants were liable only on the theory of respondeat superior. We must consider the judgment as one against tort feasors."

The Court: I can understand that very thoroughly, but what I am bothered about is whether that applies in the case of an indemnity agreement.

Mr. Archer: There is a leading case on that which covers, I think, all of the authorities that there are, and it discusses it fully. Builders Supply Company against McCabe, 366 Pennsylvania 322, 7 Atlantic Second 368, 1951. That case cites the Restatement of Judgment, Section 107. And I will read the pertinent portion of the restatement because I think it is more concise than the opinion of the Court. Comment on clause "A" and comment "H":

"Findings adverse to indemnitee's claim for indemnity."

"In actions between the indemnitor and the indemnitee, the indemnitee is subject to the burdens, as well as entitled to the benefits, of the rules of res judicata with reference to matters determined in an action brought by the obligee or by the injured person. If the judgment is based upon the [26] finding of fact which if correct would discharge the indemnitor, the latter is discharged from liability to the indemnitee by such finding, unless by agreement the entire defense is controlled by the indemnitor."

And there is no inference or allegation that we controlled the defense.

So that I think is precisely the situation which you were asking me where there is a past judgment and a finding adverse to the indemnitee.

Now, I think that that would preclude any recovery of liability against Capitol Chevrolet because the original complaint—even in the first action, the original action on the cross-claim.

The Court: As to the liability of the Capitol Chevrolet Company, the original defendant.

Mr. Archer: That is right.

The Court: I take it from what you both said, that is wholly a question of law, isn't it?

Mr. Archer: That part in the original case. Now, I would have this additional point to make, that the point your Honor made, the filing of the original action would toll the statute of limitations only for the original action and not for the second action,

and this was a new action which was brought against Capitol Chevrolet Company. [27]

Mr. Garrison has made the point—well, no damage, no loss was suffered. Our point there is very simple, and it is in the record in case No. 23171, the claims in that action, the cross-claim was precisely the cross-complaint that is now asserted, the rules providing that it could be asserted at that time.

I think the final order was in 1947; I believe the action was filed in '45—. At any rate, they could assert a claim then. But our position there is that we denied liability at that time. That denial constituted a repudiation and an election and upon which the suit was filed and the determination made to sue us at that time; while they might not have to sue us at that time, under Federal Rules they could have and under our denial they could have. So while it could apply to 23171, it can't as to this, and I have precise authority on that point, too.

The Court: Well, I don't know that it makes much difference to the Lawrence Warehouse Company whether they recovered on the cross-complaint in the first action or the second one, as long as they recovered.

Mr. Archer: Well, the point is that they couldn't recover against the other defendants in the second action; if they recover only in the first action, they recover only against Capitol Chevrolet Company, which was the only defendant joined in that action. We have additional defendants in the second [28] action as well as Capitol Chevrolet Company. I mean, your question as you stated it——

The Court: That is another question. You're speaking now of this new corporation, Kenyon, and so forth.

Mr. Archer: That is right. I want to say that the statute of limitations inasmuch as Kenyon, 23171, is not before us, and we oppose any motion for consolidation, because we think there are very definite separations there, the judgment in No. 23171 has now become merged, not even a second judgment, and in addition, we have additional defendants, you have separate defendants, and so I think for purpose of consolidation, even the question of evidence as to what would be admissible—Mr. Garrison had reference to the evidence in the prior case which I don't think could be used in the second case. So for that reason we would oppose any consolidation.

The Court: But Mr. Archer, is there any factual question that is involved as between the Lawrence Warehouse Company and the original Capitol Chevrolet Company, or the Lawrence Warehouse Company's cross-demand against Capitol Chevrolet Company?

Mr. Archer: Well, yes, I'd say there is a question of—they allege in the first place many items of loss. Mr. Garrison's position is that they suffered damage, they just paid the judgment, they had these counsel fees in the first action, and so forth.

The Court: Might be ancillary matters, except as to the—[29] Isn't it a question of law entirely?

Mr. Archer: I think a question of, one, I think the question, inasmuch as we denied liability on

the original cross-complaint, that the question of repudiation is there and——

The Court: I don't know what you mean by repudiation.

Mr. Archer: Well, my point is just like an anticipatory breach of contract, the liability is against loss of damage and that the cause of action doesn't accrue——

The Court: You mean the cross-complaint in the original action is anticipatory?

Mr. Archer: That is right. No, I mean by the fact that there was filed and we denied that there was an anticipatory breach so that the cause of action on the indemnity agreement arose then.

The Court: I don't think we would get very far under the Federal Rules on a procedure on that because they favor the more simple application of rules of pleadings in that regard and, of course, the disposition of the complaint in all its aspects where it is possible.

Mr. Archer: I agree with that. They could file, and the fact that they filed that claim and we denied it, if there was an obligation to indemnify at that point, we repudiated it, and that repudiation was an anticipatory breach, causing the cause of action to accrue at that time.

Now, if that presents any more than is contained in the [30] pleadings—I think it is shown in the pleadings—if it contained any more than in the pleadings, then it is a factual question.

The Court: That isn't very much of a question of fact, the fact that all the defendants came in

and very vigorously defended the action and claimed nobody liable in the matter.

Mr. Archer: I agree with your Honor, I don't see that there is a question of fact; the question of anticipatory breach is before us on the record.

The Court: It seems to me offhand—I am not attempting to force you gentlemen to agree to anything you don't want to agree to—that the question as to liability of the Capitol Chevrolet Company to the Lawrence Warehouse Company in either or both of the cases is really a question of law, except as to those items you mentioned, respecting the attorneys' fees or expenses.

Mr. Archer: Well, I think, as I say, I think if you decided in the second case you will have to decide the question of the statute of limitations.

The Court: It is still a legal question.

Mr. Archer: Well, in the second case, yes, it is a legal question; that's right, your Honor. Then the proof of the various items you have is the only factual consideration on that point. [31]

The Court: I was thinking that in that aspect that you might very well submit, both sides, either further argument or on motion.

Mr. Archer: I think we would be willing, the Capitol Chevrolet Company.

The Court: Would you be willing?

Mr. Garrison: Yes, certainly, your Honor.

Mr. Archer: Certainly. If you determine in favor of Capitol Chevrolet Company in the second case, it would eliminate any further case, so it wouldn't be worth while, and save time——

The Court: Now, you have another question.

Mr. Garrison: Well, I think on this question I have an affidavit here, of an officer of the Lawrence Warehouse Company.

The Court: Before we come to that, how would you determine this question of the liability on these various additional items that Mr. Archer——

Mr. Garrison: I have an affiavit of an officer of the Lawrence Warehouse Company on the expenses and amounts of money paid, and under our rules the motion for summary judgment this affidavit may be received, as I understand it, and they may——

The Court: Anything controverting——

Mr. Garrison: That raises the issue of those items, [32] what those items are.

Mr. Archer: Are the dates on there?

Mr. Garrison: I assume so; if not, we will give them to you; provide an affidavit in which the dates are shown, if they are not shown.

Mr. Archer: Obviously we cannot make an affidavit on this subject, can't have a counter-affidavit on this.

Mr. Garrison: Evidence to be introduced, and if we introduce it at the time of trial——

Mr. Archer: We will reserve our action on that until we take a look at it. We can probably reach an agreement on that, your Honor.

Mr. Garrison: That is a detail.

The Court: You can reach an agreement as to the facts themselves without necessarily conceding

that they are recoverable or that they are not a recoverable amount.

Mr. Clark: If the Court please, your Honor is not permitting the affidavit to be introduced in evidence?

The Court: Well, the affidavit may be filed, and then you can either file a counter-affidavit, if you wish to, or make an objection to the affidavit, or come to an agreement as to the facts, whichever way you wish.

Mr. Garrison: If we don't get together on the facts——

Mr. Archer: We would just have to take further procedure. [33]

The Court: I am permitting it to be filed, but with the right of the other side to take whatever action they wish.

Mr. Garrison: I agree with your Honor the question of the liability of Capitol Chevrolet Company and of James A. Kenyon can be decided by your Honor now on the law, because Mr. James A. Kenyon, in his answers to our interrogatories, which will be filed, admits that he assumed from the Capitol Chevrolet Company, when it was dissolved, its liabilities. Then if this turns out to be a liability of Capitol Chevrolet Company, then he agrees that he has assumed that liability.

The Court: Would that be stipulated?

Mr. Garrison: You agree with that?

Mr. Archer: Well, Mr. Kenyon has a separate defense on the statute of limitations. Your Honor remembers in the first action he testified at that

time that Capitol Chevrolet Company had been dissolved and that its assets had been transferred and that he was the owner. I don't have the certified transcript with me, but it would be my position that I would put that in evidence to show that the Lawrence Warehouse Company was on notice at that time and the transfer and statute began to run at that time to set aside any transfer.

The Court: Let us protect your rights in this way: Would you stipulate that if the Capitol Chevrolet Company is determined to be liable that Kenyon would be liable under his agreement, subject to the validity of any defense he might have on [34] the statute of limitations?

Mr. Garrison: Question of law.

The Court: Just trying to save you gentlemen having to present proof.

Mr. Archer: Yes, the contract is valid, no doubt about that.

Mr. Garrison: I just want to cover this one point again that counsel makes that, as I understand his statement, that the position that this finding here precludes a recovery by Lawrence against Capitol notwithstanding the fact that that liability arises only because of the doctrine of respondeat superior and because of the negligence of Capitol.

Now, the answer to that question is found in the finding itself. It says in finding 5, which he read:

"On April 9th, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and

diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises * * *"

We weren't within 100 miles of that place.

The Court: Mr. Archer's point, Mr. Garrison, is that all these findings show is that defendants were guilty of negligence. [35]

Mr. Garrison: Right.

The Court: And he says you can't look to the opinion or reasons of the Court to determine whether or not that liability was based upon, what theory it was based upon, whether respondeat superior or not, and all you have is a judgment that both of the defendants committed negligence.

Mr. Garrison: It is perfectly consistent with an interpretation that it was based upon the doctrine of respondeat superior, couldn't be based upon anything else, because the negligence on which the liability was based was the action of the agent, so it would be consistent with the findings. It would be inconsistent with the English language to say——

The Court: No mention about that, all the judgment says is that——

Mr. Garrison: Here's what the judgment says: that both defendants are liable because the agent was negligent.

Mr. Archer: It doesn't say "agent."

Mr. Garrison: Just a minute, please. Both defendants are liable because the Capitol Chevrolet Company permitted the torch in there.

The Court: That is true.

Mr. Garrison: That is true.

The Court: That is the conclusion, but the judgment that I read from doesn't say that, that is the point.

Mr. Garrison: Well, I submit the case on the finding, [36] because you couldn't read that finding any other way than to find from it that the negligence of Lawrence was based upon the doctrine of respondeat sperior, because the act was the act of the agent.

The Court: I think you better submit some authorities on that. I don't know that I am necessarily convinced by Mr. Archer's argument, which is ingenious, and apparently has some weight behind it, but his point is clear that the judgment is only against the defendants and therefore, by the judgment, they were joint tort feasors and then that precludes one from recovering against the other. That is what he says, only can look to the judgment.

Mr. Garrison: I agree, we don't desire to impeach the judgment, we don't desire to explain the judgment, and we only have to look at the judgment and we see, when anyone reads that judgment, they will find that the liabilities, it is stated as being jointly liable, the Lawrence Warehouse Company couldn't be liable under any other doctrine, because the acts here were the acts of the agent, and nothing inconsistent in that finding with that result.

The Court: Well, I think so far, then, up to the point of the claim, cross-complaint against the

Capitol Chevrolet Company and Kenyon, subject to the two reservations that we made, we have a question of law.

Mr. Garrison: That is right. [37]

Mr. Archer: Correct.

The Court: What about these other defendants, other companies?

Mr. Garrison: I will take that up. First I would like to ask of these gentlemen——

The Court: Are you going to remain over tomorrow?

Mr. Clark: Yes, sir.

The Court: Well, I think—I have been in a jury trial since early this morning and I think I ought to allow you sufficient time and I think if we do we may be able to get this matter in shape so that it may be submitted to the satisfaction of all parties here.

Mr. Garrison: Fine.

Mr. Archer: Fine.

Mr. Garrison: About what time?

The Court: I thought that if I continued it until tomorrow at two o'clock, we would have ample time to complete the whole matter and perhaps even work out a pre-trial order in the matter that would protect both sides and that would delineate the precise issues of the case so that we would know just which way we are going. Is that satisfactory to you? I will continue it until tomorrow at two o'clock.

Mr. Garrison: Thank you.

Mr. Archer: Fine.

(Whereupon an adjournment was taken until January 9, 1952, at 2:00 p.m.) [38]

January 9, 1952

The Clerk: RFC versus Capitol Chevrolet, further pretrial conference.

Mr. Archer: Ready for the cross-defendants. Your Honor, I have one or two points on the first question which we went through yesterday, not a reargument, just a clarification of the issue, that is, the submission of the question of the liability of Capitol Chevrolet Company, the original company, that is. Our tenth defense, and the tenth defense of Capitol Chevrolet Company, which is the effect that Lawrence Warehouse was equally, jointly, and contributorily, negligent, or any of them, and acquiesced in or consented to the negligence of Capitol Chevrolet Company, if any there was, we contend that that is an issue of fact to be reserved in the submission. The Court would still decide, if it takes the view which I advocated yesterday, that the former findings and judgment are binding on both Capitol Chevrolet and Lawrence Warehouse. If it takes that view, then that would result in a summary judgment in favor of Capitol Chevrolet Company.

The Court: Why would that be?

Mr. Archer: As I say, they take my construction that Lawrence Warehouse was negligent, independently negligent; unless that point has been decided, then there are no other issues. [39]

The Court: Of course, unfortunately, I tried that case and I could not conscientiously come to

that conclusion because the facts were that the Lawrence Warehouse Company had employed the Chevrolet Company as agent to do the warehousing.

Mr. Archer: I understand that your Honor might have some reluctance to come to that, but our point is that the findings and the judgment preclude any other regardless of what the facts in the case may have been that are now consummated in the findings and the judgment.

The Court: Suppose you had a trial on that issue of fact: how could the Court come to any different conclusion than it came to at the trial?

Mr. Archer: Oh, then we are raising the additional issue here that they acquiesced in whatever negligence we did. Specifically, one of the items of negligence is there was not sufficient fire protection for the Ice Palace and it would be our contention in the trial of that fact that the location of the Ice Palace was known by Lawrence Warehouse and consented to by them. That is, I believe, a typical offense in an indemnity-principal relationship, that if the negligence of the agent was acquiesced in and consented to by the principal, that there is no indemnity. I simply want to reserve that defense, which I do not think is covered in the findings in the prior case, that is, apart from the separate and independent negligence of Lawrence Warehouse Company. [40]

The second point I wanted to make was in the pleadings there was no mention made that Lawrence Warehouse gave notice of the first action, gave notice to Capitol Chevrolet Company to de-

fend, and offered them the opportunity of managing the defense, the typical thing in an indemnity situation, and there is nothing in the pleadings about that. I think that might raise a question of fact. As you know, neither counsel from Los Angeles or our firm was in the first case, and I do not know what the facts are.

The Court: That Capitol was represented by counsel in that case?

Mr. Archer: I was referring to Lawrence Warehouse giving notice and the opportunity to Capitol Chevrolet to manage Lawrence Warehouse's defense.

Mr. Garrison: We sued them.

Mr. Archer: I mean the defense against the Defense Supplies Corporation. I think it is a typical situation between indemnitor and indemnitee. When the indemnitee is sued, he gives notice and opportunity to manage the defense.

The Court: I do not think much of that point. Both defendants were in court. Both vigorously defended the action and acted together in the matter.

Mr. Archer: There is the item of costs and attorneys' fees. I would say if we are not given an opportunity to defend, if they manage the defense, then they cannot throw over the [41] cost they incur independently on us. There is no allegation in that regard in the complaint or no averment and to take it as it stands now, we would argue if it were submitted without such an averment, we

would not be liable. I think if we went to trial under federal pleadings, certainly Lawrence Warehouse Company could show there was notice. I wanted to remove any question. I did not want to be arguing contrary to the fact when it was submitted.

The Court: Your point there is it affects the right to recover and the amount of costs and attorneys' fees is affected by that?

Mr. Archer: That is right, and so some extent the degree of proof of the judgment. But I do not think there is any question about the attorneys' fees and the costs independent of that. I am willing to let it go in the allegations, the averments as they are, but if it is contrary to the fact, that is up to Mr. Garrison. He undoubtedly knows what the fact is on that. And in regard to the same thing, the attorneys' fees and costs, in the affidavit which was submitted I wanted an itemization of each date, the date that each cost or attorney fee was paid, with the idea that if it accrued four years prior to the action, it is barred. And in the same light, when we speak of submitting these questions, I am sure it is understood Lawrence Warehouse would move for summary judgment on the liability of Capitol Chevrolet Company, both [42] Capitol Chevrolet Company and Kenyon and Capitol Chevrolet Co. would move for summary judgment on the same issue, so it would be a mutual judgment in that case. But that is all that I have on that first point.

The Court: Before you sit down, Mr. Archer, have we reached the point or not as to whether or not the liability of the Capitol Chevrolet Company

and Kenyon on a cross-complaint may be determined on pre-trial or not?

Mr. Archer: I would say this: I would put it this way, that the issue of the liability of Capitol Chevrolet Company on the cross-complaint of Lawrence Warehouse Company in No. 30473, the present action, is to be submitted save and except the issue raised by the tenth defense in the first amended complaint, which he reserved for trial on the merits, if necessary, and the tenth defense is the one I mentioned when I started here about acquiescence.

The Court: I think I have that in mind.

Mr. Archer: The issue of the liability of James A. Kenyon on the cross-complaint of Lawrence Warehouse, 30473, to be submitted save and except the issues raised by the defense of the statute of limitations, and again the tenth defense in the first amended cross-complaint, which reserved for trial on the merits if such became necessary.

The Court: What would be the result of that sort of stipulation? What could the Court decide on the pre-trial? [43]

Mr. Archer: It would be precisely as if Capitol Chevrolet Company, Capitol Chevrolet Co., and James A. Kenyon moved for summary judgment on the basis of the judgment and findings in the prior action, on the ground that it was there determined that Lawrence Warehouse Company was negligent, and so is not entitled to indemnity, which would preclude, and if the Court decided that in favor of the cross-defendants, there would be no

further issues in the case as to any defendant.

The Court: What you are really saying there is that all the Court could decide on the pre-trial would be a judgment in favor of your client, that if the view of the Court was the other way, there would have to be a further hearing in the matter.

Mr. Archer: That would be true on the statute of limitations in any event, as we decided yesterday, except Mr. Kenyon, and it would give us only the tenth defense, which I said was as to a trial on the merits.

The Court: I do not see much ahead then in the way of accomplishing anything on pre-trial, because I do not see what good it is going to do to submit the matter as if it were a motion to dismiss. That is what you are really saying.

Mr. Archer: Or a motion for summary judgment.

The Court: What you are really saying is I could grant a motion for summary judgment in favor of the Capitol Chevrolet Company on the present state of the record, but I could not [44] amend a motion for summary judgment in favor of the Lawrence Warehouse on the present record because, to do that, we would have to have a further hearing on the facts.

Mr. Archer: There is a factual issue there. I do not see how you could do it without eliminating the tenth defense. I will be perfectly frank. I think the motion to dismiss it would be good.

The Court: Then I think the best thing to do under those circumstances would be to put it down

for a trial date so that we can finally dispose of it. I do not see much use of us continuing with the pre-trial. I know all about this case. It has quite a history to it. I do not think I need any pre-trial in it unless in the pre-trial we can accomplish the submission of the case. That was the thought I had in mind. I am not attempting to force either side to do that or even suggesting that you should do that. After all, you have to decide what you are going to do with your own case. But the purpose of this meeting was really to determine whether or not we could submit the case for decision in pre-trial, and if we cannot do it, then we can't do it. We can't accomplish the impossible. We have to try it, that is all. It would seem to me that is the result of what you said, Mr. Archer, unless I do not quite get everything you say.

Mr. Archer: I agree, your Honor, that is precisely what I said. The reason I brought it up was ordinarily in pre-trial [45] we define the issues of the trial. I came prepared yesterday to define the issues.

The Court: I know what the issues are.

Mr. Archer: The second thing is Mr. Garrison moved for summary judgment, and I do not see how summary judgment in any event could eliminate our tenth defense, because that was not even encompassed in the prior proceeding at all. It was then that I moved for summary judgment because I do think the case at this stage can be decided against Lawrence Warehouse without raising any question of fact. I do not see how it can be decided

against the cross-defendants without raising a question of fact.

The Court: I thought yesterday all that was going to be reserved was some question about attorneys' fees, and that that was the only question of fact that would require any trial. But now it appears from what you said there is this other matter.

Mr. Clark: It is all in the pleadings. I wonder if I might interpose for a second. Perhaps from the standpoint of a bystander I could state our position quite succinctly. Our position is simply this, that there is only one thing that the Court can do in this case, without committing error. I say that, of course, with complete deference for the Court. The action in this case is brought upon a judgment. That is what the cross-complainant is suing upon. He cannot take part [46] of that judgment and refuse to take another part. He has got to take that judgment, the burdens and the benefits. One of the burdens of the judgment is that it found the cross-complainant concurrently guilty of negligence with the cross-defendant, and if your Honor will examine the authorities, I submit with complete deference, your Honor will find that that is the rule of law, and that will end the case. In that aspect of it, Capitol Chevrolet Company, I submit, is entitled to summary judgment and the case is over. That is all there is to it. These other issues of fact are in the pleadings and we can't lay them, because we do not know what your Honor is going to decide on this first issue.

The Court: I suppose under those circumstances

it would be better to save everybody's time to have the trial of the matter and determine that issue along with the others, and if you win, you win anyhow. I do not suppose you care particularly how you win on the matter. And then the Court would not be confronted with the situation that if it denied your motion for summary judgment, we would still have to have another hearing of the matter. We might as well dispose of the whole case.

Mr. Clark: I think that would necessarily follow. There would have to be another hearing. But still in the interest of expediting the trial and saving the Court's time and counsel's time, it would seem to me an advisable thing to do [47] would be to pass on this first issue in advance of the others. I believe your Honor will find the whole thing will be over. I do not say that purely argumentatively. I think it is a sound position.

Mr. Garrison: I agree that is a question of law, and we are perfectly *willing* to have the question of law submitted. If they believe that they have some evidence of negligence on the part of Lawrence Warehouse, they could submit that by affidavit in this pre-trial, and maybe we would not even dispute it. It is true there was not any contention made in the first trial that Lawrence Warehouse was negligent, and I do not believe there will be evidence ever introduced in this case that Lawrence was negligent, but it could be very limited at most, and if they want to submit it by affidavit, it is perfectly proper in a pre-trial conference.

The Court: Your view is if the Court were to

deny Capitol's motion for summary judgment, there would not be very much to stand in the way of the judgment from the factual point of view in favor of the Lawrence Warehouse Company.

Mr. Garrison: That is right, and if they have some item of fact which they think bears upon Lawrence's conduct in the matter, it could be set forth in affidavit form, in this pre-trial. I have no objection to going ahead with the trial, but we are going to end up with five minutes' testimony and submit the case on the law. That is what we are actually [488] going to do, and make some more arguments and file some briefs. I agree with your Honor if they do not want to submit it on affidavits, I suppose they are entitled to have their question of fact heard, and we have no objection to that.

The Court: What do you think of the idea of submitting the respective motions for summary judgment now?

Mr. Archer: Yes, your Honor, I think that would expedite the case.

The Court: What is your thought on that?

Mr. Archer: That would be a nice arrangement for them. I have no objection to that. That gives them the privilege of having their cake and eating it, too. They have a situation where they have nothing to lose and everything to gain. I am so confident of the law with respect to that I am perfectly willing to do it. But you have nothing to gain by it.

The Court: If their motion for summary judgment is denied, what would be left would be very

little for the determination of the case. Do you all agree to that?

Mr. Archer: Mr. Garrison is probably closer to the facts than we are. If he says that, that is probably true.

Mr. Garrison: You ought to know. If you have some negligence on the part of the Lawrence, you ought to know what it is now.

The Court: I couldn't really decide the motion for summary judgment on behalf of Lawrence Warehouse without having [49] additional facts.

Mr. Archer: Correct; I think the big issue in the case would be met if a decision was made on the motion for summary judgment by Capitol Chevrolet Company and Kenyon.

The Court: If that motion were denied, there would be very litle left in the case.

Mr. Archer: Yes, your Honor, except with the other parties. A new party has been added to the case.

Mr. Garrison: There is this much to be said: these interrogatories that have been answered disclose a new party having assumed the liabilities along with Kenyon, and so it becomes necessary that we bring that party in. It is the Adams Service Company, which is the corporation of which Phelps, the present head of the Capitol, was formerly identified with. So we have got to bring that company in anyway, and that being the case, if you want to finish it all up at one time, maybe we had better set it down for trial on some date.

Mr. Archer: Your Honor, the motion of Kenyon

and Capitol Chevrolet for summary judgment is like any motion to dismiss where reference is made to additional matters, and like any other motion, you have a person who wins and one who loses. You go ahead and answer or go to trial. While we were perfectly willing to go to trial on Tuesday, because we think this is the principal issue in the case, and I think certainly most of the questions as to the transference would be answered [50] in the interrogatories, I do not think we have any objection to the type of answers here received. We have had full answers to everything that has been asked. I think we can stipulate to most of them.

Mr. Garrison: There has been a failure to answer some points, but that is beside the point.

Mr. Archer: There will be no question there.

The Court: What you are trying to do is this: assuming you get judgment against the Capitol Chevrolet Company and Kenyon, you want a further judgment against the transferee.

Mr. Garrison: That is right. We seek to follow the assets of the first corporation.

The Court: Can you do that in this proceeding?

Mr. Garrison: Yes.

The Court: You have authority for that?

Mr. Garrison: Yes, very clear authority. The assets of the first corporation are trust assets upon the dissolution of the corporation. They were very substantial, in excess of $100,000. They were taken by a partnership, and the cases are very clear that once that dissolution occurs and the stockholders take the assets, they become trustees, and that

property is in trust, property in favor of any creditor, and you can trace that trust property in the same way that you can trace any trust property.

The Court: I am familiar with that. What I was wondering [51] about is can you do it in the original action?

Mr. Garrison: Yes, because we are entitled to judgment against anyone who has those trust properties in their possession, provided they are not bona fide purchasers without notice, and that is not the case here.

The Court: In the same action?

Mr. Garrison: Yes.

The Court: In the principal action?

Mr. Garrison: Oh, yes, very clearly.

The Court: Yes. Will that be controverted factual matter?

Mr. Archer: One step has been skipped by Mr. Garrison and that is the stockholders of Capitol Chevrolet Company assumed the liabilities. There was no fraudulent transfers or anything. There was a contractual arrangement there. So I think that is the end of it. You have a perfectly valid transfer and an assumption of liabilities by the two stockholders.

The Court: There is no question involved there. If you lose in this case, the judgment would have to go against these defendants.

Mr. Archer: Yes, against Kenyon, and the only question is the statute of limitations.

The Court: The statute of limitations against the other defendants.

Mr. Archer: That is right. [52]

The Court: Besides your other points.

Mr. Archer: That is right.

Mr. Garrison: All questions of law.

The Court: Except that you would not have any factual question except the legal question of the statute of limitations.

Mr. Archer: That is right.

The Court: While I appreciate Mr. Clark's suggestion, I think I would feel the same way about it if I were the advocate sitting down there, I would like to get my motion decided first; there seems to be so little the Court has to decide here, we might as well dispose of it all at one time.

Mr. Clark: Your Honor, the Adams Service Company is not represented nor its counsel. We do not represent it. Nobody at this counsel table represents it. It is a new party to this action. Nobody knows how long it is going to take to get Adams Service Company represented. I do not know whether counsel wants to take depositions.

The Court: Are they named as the defendant?

Mr. Garrison: We are asking permission to name them. We just learned about them last week when the interrogatories were answered. But that corporation was formerly supervised by Mr. Phelps. Mr. Phelps was connected with Adams Service for many years, and he is now president of the Capitol Chevrolet Company. [53]

Mr. Clark: If your Honor please, that is not the point. The question is whether Adams Service Company is represented by counsel. I may repre-

sent a man generally, but still have no right to represent him in litigation unless he told me.

Mr. Garrison: We propose to bring them in.

The Court: You have not brought them in yet?

Mr. Garrison: No, I just learned about them last week.

The Court: The only defendants before the Court now are the original Chevrolet Company, Kenyon and the present corporation?

Mr. Garrison: That is right.

The Court: The surety company is out?

Mr. Garrison: That is right.

The Court: At the present time you are asking a judgment against the original Lawrence Warehouse Company and Kenyon——

Mr. Garrison: The original Capitol.

The Court: The original Capitol and Kenyon?

Mr. Garrison: And the present corporation.

The Court: On the ground that Kenyon assumed the obligations of the Lawrence Warehouse Company, and then you are asking additionally for a judgment against the new Capitol on the ground they are the successors of any interest with obligations to pay. You are going to bring in somebody else besides?

Mr. Garrison: We are going to bring in another corporation that assumed the liabilities along with Kenyon. Let me tell [54] you the story as disclosed by the answers to the interrogatories. First incorporated in 1942 there was the Capitol Chevrolet Company, a corporation, half owned by James A. Kenyon, and half owned by Adams Serv-

ice Company, a Nevada corporation. On May 31st, 1944, that corporation was dissolved. The assets were bodily, in bulk, transferred in title half to James A. Kenyon and half to Adams Service Corporation. Adams Service Corporation at that time was headed up by Mr. Phelps, I believe, by Mr. F. Norman Phelps. That partnership continued until April 10th, 1946.

The Court: The partnership between the corporation and Kenyon?

Mr. Garrison: Continued and operated the business just the same as it had before, the same place, the same assets, and then five days before this judgment was signed, a new corporation was formed, the present Capitol Chevrolet Co. Mr. Kenyon and the Adams Service Corporation transferred all of the same assets to the new corporation and stock was issued then, approximately one half to Mr. Kenyon, part in a trust for us at that time, part into a partnership, Jak Co., wholly owned by Mr. Kenyon; the other half of the stock was issued to Mr. F. Norman Phelps and his wife, the man who had been identified with the Adams Service Co. That was a very convenient arrangement, apparently, for a while, until gradually the stock of Mr. Kenyon began to be transferred out of his trust [55] for his daughter in the Jak Co. Company until December 1949. Mr. Kenyon in trust for his daughter. And the Jak Co., his wholly owned subsidiary corporation, appeared to have no interest whatever in the present Capitol Chevrolet, and it is all owned now by this Mr. Phelps, who

was formerly the Adams Service Co. So we have that change and course of transfers.

The Court: What difference would those transfers in stock make if the present Capitol Chevrolet Co. has in fact all the assets?

Mr. Garrison: It doesn't make any. It was intended to have the effect of relieving Mr. Kenyon from his assumption of liability, because what happened, you see, is that they dissolved the corporation; Mr. Kenyon and the Adams assumed the liabilities, you see, theoretically relieving the corporation of its liabilities, putting them in the hands of an individual, and then gradually over the years the individual ends up with nothing. So that if the transfers had their intended effect, we would have no solvent person to whom we might look for the assumption of the liabilities, because there is nothing appearing in the name of Mr. Kenyon at this moment, nor is there anything in the Adams Service Co. at this moment. It is all in the name of other individuals, you see. So that is the problem we have. As a matter of fact, Mr. Kenyon now resides partially in Mexico.

The Court: But the same Capitol Chevrolet Company is [56] still in existence?

Mr. Garrison: Exactly. All the assets are there. The business is being conducted in the same place.

The Court: On the theory of following those assets, you are asking for a judgment against them?

Mr. Garrison: That is right, because it is in effect the same corporation, and the Mr. Phelps who took the stock out of these transfers had full knowl-

edge of the obligation assumed by Adams, because he was a part of Adams. He was Adams. So he is not a bona fide purchaser. We expect the Court when it gets into that will see that all those transfers, whatever they might have been, had no effect upon these trust funds and the people for whom this trust was created, because the Court looks very jealously to transactions of that kind, and the cases say that particularly where one man is predominant in a corporation's affairs, and these transactions occur, then there is some suspicion, more suspicion than ever, upon the circumstances if it ends up with no one liable, and furthermore, the burden is upon Mr. Kenyon to explain to your Honor's satisfaction that these transactions do not have the effect of leaving the creditors without any place to look.

The Court: Is there any doubt about the ability of the present Capitol Chevrolet Company, if a judgment is rendered, to respond?

Mr. Garrison: Oh, no, it is very solvent. [57]

The Court: Then what do you need the defendants you just mentioned in the case for?

Mr. Garrison: Well, they assumed the liabilities and we ought to name everyone who has anything to do with it.

The Court: I just do not quite see from your discussion why there is any legal requirement or necessity for adding Phelps and this other company you mentioned. What was the name of it?

Mr. Garrison: Adams Service Company.

The Court: Adams Service Company, when you

still have the corporation which succeeded to the assets under this guaranty of the payment of liabilities in existence with those assets.

Mr. Garrison: Remember now, your Honor, that the present Capitol Chevrolet Co., the corporation that has the assets, did not ever itself assume the obligations.

The Court: No, but you have told me that the two stockholders of that company who had guaranteed the assets and received them from the original company, turned them over to the present Capitol Chevrolet Company and became stockholders of that company.

Mr. Garrison: Yes.

The Court: They have since, as you have said, parted with some of their stock.

Mr. Garrison: The Adams Service did not show up as a stockholder in the present corporation. They faded out of the [58] picture when the new corporation was formed and Mr. Phelps arrived on the scene. I have not yet shown that Mr. Phelps was Adams Service. I think that is a fact, and I think at this pre-trial conference we are entitled to ask them if that is not the fact, that Mr. Phelps was the Adams Service.

The Court: It looks to me like the principal legal question in the case is the one that Mr. Archer poses and once that is determined the rest of it is not too difficult.

Mr. Garrison: That is right.

Mr. Archer: That may involve some time. I suppose you propose to take depositions?

Mr. Garrison: We are going to try to take depositions. Whether we can locate Mr. Kenyon for that purpose when he gets out of the hospital I do not know. We had a hard time serving him with this notice. We traced him all over Mexico and California and finally got him up at Tahoe. I think this, your Honor: counsel makes a considerable point here of his legal proposition about your Honor being forced to construe the findings differently than the facts warranted they should have been drawn. I do not believe that is going to be the result, but they make a point of that. I am perfectly willing to submit that on briefs to your Honor in advance of any trial date.

The Court: That is what you have in mind?

Mr. Archer: Yes, your Honor. [59]

Mr. Garrison: You can submit it under the head of summary judgment, motion to dismiss, submission of arguments on exceptions of anything you like. I don't care.

The Court: That could be submitted on the cross-defendant's notice for summary judgment.

Mr. Archer: Correct.

The Court: And leave that matter for the time of trial.

Mr. Garrison: That is fine. It wouldn't make any difference.

The Court: Why don't we fix a time for the submitting of this motion and also for the time of trial?

Mr. Garrison: Why don't we submit both motions?

The Court: We can, but you say you have some additional evidence to present.

Mr. Garrison: No.

The Court: You did with respect to some of these defendants.

Mr. Archer: There is that question of fact.

Mr. Garrison: No, everything I have is in the interrogatories.

The Court: You are talking only about the original Capitol Chevrolet and Mr. Kenyon on your motion for summary judgment?

Mr. Garrison: No, I would like to submit it as to all of them—I mean on the three. [60]

The Court: But you have to submit something in support of your motion with respect to the other defendants.

Mr. Garrison: Well, we won't make a motion with respect to them. My motion goes only to the three.

The Court: In other words, you are willing to submit at this time only a motion for summary judgment as to the original Capitol Company and Kenyon.

Mr. Garrison: And the present corporation, who is a defendant in this case.

The Court: Of course there, as to that present corporation, wouldn't you have to have some factual support for your motion?

Mr. Garrison: No, the written interrogatories set forth those transactions.

The Court: You think there is sufficient in the record on that?

Mr. Garrison: Yes.

The Court: All right. Then you gentlemen both submit your motions for summary judgment.

Mr. Garrison: And we will brief the question.

The Court: I think that the main question is the question of whether or not Mr. Archer's client can succeed on his motion for summary judgment. If he can, that puts an end to the case.

Mr. Archer: Yes, on the motion—— [61]

The Court: If he can't, then I have to consider your motion for summary judgment, and there I might have some little difficulty in deciding on a motion for summary judgment, if there is any controversy as to facts. You know how the Court of Appeals has ruled here on these motions for summary judgment. I have had by fingers burned a couple of times about it and so I am rather cautious about it. I mean by that I look at a record on a motion for summary judgment. I can't see any conflict on it. It is argued to me and then some learned colleague of mine goes through the record with a fine-tooth comb and finds where somebody at page 72 said something and says, "Well, a factual question can lurk in this matter."

Mr. Garrison: We do not want a judgment that won't stand up. I would rather go through a day of ordeal in court listening to a claimed negligence rather than running a risk.

The Court: I think the main legal questions—and I do not want to persuade you to do what you did not intend to do—but the main legal questions could be submitted on the Capitol Chevrolet's mo-

tion for summary judgment and on your motion for summary judgment as against the original Capitol Chevrolet Company and Kenyon, because there you really have no disputed question of fact.

Mr. Garrison: That is fine.

Mr. Archer: We do have that statute of limitations point, your Honor, that I mentioned was in the transcript. [62] I believe Mr. Garrison has been trying to paint a picture here. As I brought to your Honor's attention yesterday, if this went to trial we would put in evidence the fact that Lawrence Warehouse was put on notice of all these transfers.

The Court: Submit an affidavit in that regard. You would have to submit an affidavit to see whether or not it is controverted. If it is controverted as to that aspect of the matter, then I could decide it.

Mr. Archer: Maybe it would not be controverted.

Mr. Clark: Maybe counsel can in open court agree on certain portions of the reporter's transcript of the prior trial and prevent the necessity of submitting an affidavit on either side.

Mr. Garrison: I think your Honor has the reporter's transcript at your disposal, without our submitting it.

The Court: You will have to point out what you want.

Mr. Archer: It is not in this case. It is hearsay.

Mr. Garrison: It is not hearsay at all. Let us put ourselves back to the conclusion of the original action by Defense against these two people. There were then present cross-complaints by Law-

rence and also cross-complaints by Capitol against McGrew pending in that action. Do you mean to say your Honor could not have in mind the evidence that went into the original case in considering the cross-claims in the same case, or could not call the reporter up for his transcript, or have [63] it written up or anything else you want to? We are in those cross-claims just as though the case had been finished yesterday and we were starting on the cross-claims with separate findings and a separate judgment.

The Court: That is true as to the first case.

Mr. Garrison: Certainly, and their position at this point is to me most novel because they stipulated at that time those cross-claims could be held over and determined at a later date. How can they stand here now and say, "We won't permit you to think about the evidence in that case because it was some time earlier"? That is in conflict with everything that was done by their predecessor counsel. They are bound by it.

Mr. Archer: Your Honor, this is the second case. If that was an issue in the first case, we have a final judgment on it. The final judgment says nothing about it. The final judgment would have merged the cause of action if that were true.

The Court: I do not follow that.

Mr. Archer: If that evidence in the first case were submitted on the issue in the cross-complaint, then the cross-complainant's action merged in the judgment. If it was not submitted on it, it was hearsay.

Mr. Garrison: It was reserved by agreement of counsel.

The Court: We would have to look at the transcript. [64]

Mr. Archer: I think that is largely academic. This is the second case; we are not in the first case.

Mr. Garrison: Oh, yes, we are. We have two actions pending here, the cross-claims in that case and the present new suit filed naming additional defendants, and I asked your Honor the other day to put them together so all issues could be determined at one time. There is nothing mysterious about that.

The Court: I do not see why you are concerned with litigating the matter in the second case at all.

Mr. Garrison: Because I think I am going to have a hard time collecting anything from the Capitol Chevrolet Co. They are out of existence. I think Kenyon has transferred out of himself and into trust and other corporations everything he has. He has moved to Mexico. I do not believe I can ever collect from Kenyon or the Capitol Chevrolet.

The Court: You can do in the second case everything you did in the first case.

Mr. Garrison: We have a new party in the second case.

The Court: You can name the party in the first case.

Mr. Garrison: It is an individual. They filed suit on the judgment. We paid it, and after we paid it, we have a new set of facts to allege.

The Court: I am not saying what you should

do, but assuming you get over the hurdle of the legal question that [65] has been raised by your opponent, you only make more pitfalls for yourself when you litigate your claim against the people you want to recover from in the second case, because it was in the first case that the rights of the cross-complainant and the cross-defendant were reserved for further consideration.

Mr. Garrison: Yes, but here is what happened: the indemnity agreement with Capitol provided that they would indemify us against two things, liability and loss. Our first action alleged in the first cross-complaint that if we had a liability to Defense Supplies, it should be transferred to Capitol. Since that time we have had a loss, so we have a cause of action under the agreement for that loss as distinguished from the original liability, you see, and that did not occur until we paid the judgment here in this matter.

The Court: It still would not stop you from asserting that in the first case.

Mr. Garrison: We could have amended that cross-claim and alleged it, but what is the difference? Is this Court going to spend its time to determine whether it should have been amended or set forth separately?

The Court: I am going to say something now that maybe you gentlemen will take offense to. This is a busy court. I have lots of cases to consider. Of course, all litigants are entitled to their rights here, but I think the best thing to do, with the astute suggestions and arguments of able counsel [66]

in this case, is just to set it down for final trial and hear everything everybody has to say on every subject, and I will get through with it that way. This way I will be reading your briefs on motions and then I won't be satisfied. Somebody will have a technical point that will militate against the disposition of the case on the motions, and then we will have to go back and do it all over again. I think in the long run we will be better off to do it this way.

Mr. Garrison: I have no objection.

The Court: I think I have a fairly good idea of the points that can be raised in this case. I think that we had better fix the time for trial and each side can present anything they want, both on the facts and the law, and then I shall decide the whole matter at one time.

Mr. Clark: We were trying to save Your Honor that bother. That is all.

The Court: I know, but you are living in the atmosphere of the advocate who believes he has already convinced the judge he is right and it is a waste of time to consider the other fellow's view. You may be right about it, but I would just as soon hear the whole thing at one time and get through with it. You may be quite right that the law is overwhelming, as you say it is, and in the end I will have to come to that conclusion, but I think it is better in litigation that has dragged through so many courts for so long finally to get [67] through with it. When will both sides be ready to dispose of the case finally?

Mr. Clark: So far as I am concerned, if the

Court please, according to my present calendar—of course, I cannot tell when cases go off—but I could not possibly reach it before the first of March and I would have to have a day or two to refresh my recollection if it is going to trial on the merits.

The Court: The first week in March?

Mr. Clark: Yes. I am due to go to trial on a case on the merits this month and also in February.

The Court: This would not be a protracted trial itself. It might require the submission of briefs and that sort of thing, and even if I were engaged in the master calendar work or some other work, I could hear it. Would the first week in March be all right with both sides?

Mr. Garrison: That would be all right with us.

The Court: How about the gentleman from Los Angeles? How about Wednesday, March 5th?

Mr. Archer: That is satisfactory.

The Court: I will take care of it. I will consolidate both cases. You can consider them as one and try both of them.

Mr. Archer: I just wanted to know if it wasn't by stipulation—as I stated yesterday, we objected to the consolidation because of the question of limitations and the addition of additional defendants. [68]

The Court: As far as I can see, you can still reserve all of the legal questions in a consolidated case, with respect to any particular case, because the only effect of a consolidation is for the purposes of trial. It does not affect the rights, the legal rights of the party in the particular cases that are consolidated for trial, and I think it is in

the interests of justice to consolidate them, and as I say, having as you do the right to raise any legal question in a particular case, it is just a question of hearing them at the same time. That is what a consolidation is.

Mr. Garrison: One other thought——

The Court: I will grant your motion to consolidate and I will set both cases for trial on March 5th.

Mr. Garrison: They have alleged here every statute of limitations in the Code—six months oral contract, two years, four years, judgments. One purpose of a pre-trial is to settle those issues somewhat so we know what we are going to try. I just cannot conceive that all those statutes have an effect on this case. It seems to me it would be very helpful to everyone concerned if we could get the issues down here so we would know what we are going to try. That is one of the purposes of a pre-trial conference.

The Court: What is it you want to do, ask the defendants whether they rely on all or only some of the pleaded defenses?

Mr. Garrison: Yes, I wonder if they are relying on all [69] of them.

Mr. Archer: I rely on all of them, if Mr. Garrison's statement as to what he intends to prove as to transfers are true. If he intends to go through that, I will have to rely on them. If he is relying on his assumption of guaranties, we may be limited to three and four year statutes. But the pleadings

do not allege these transfers. I can't tell what his proof is going to be.

Mr. Garrison: For instance, this is section 339, which has to do with an oral contract. Is that an issue?

Mr. Archer: Is an oral obligation in writing?

Mr. Garrison: Yes.

Mr. Archer: I do not know.

Mr. Garrison: Then did you just put them in out of an abundance of caution?

Mr. Archer: No.

Mr. Clark: If you will tell us what your theory is——

The Court: I do not think you need be concerned about that, counsel, because whatever the facts are will determine whether or not any of these provisions of law, and so far as the pleadings are concerned, even if it was not pleaded, under our present Federal Rules of Procedure it does not make any difference. Whatever the facts are, they either do or do not fall within the purview of the statute of limitations.

Mr. Clark: I am sure your Honor won't have any trouble [70] with it.

The Court: Very well. We will adjourn in this case until March 5th.

[Endorsed]: Filed May 13, 1953. [70A]

[Title of District Court and Cause No. 30473.]

DEPOSITION OF F. NORMAN PHELPS

Be it Remembered that on Thursday, the 14th day of February, 1952, at 2:00 o'clock p.m., pursuant to subpoena, at the office of Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, Crocker Building, 620 Market Street, San Francisco, California, personally appeared before me, Selma R. Conlan, a notary public in and for the City and County of San Francisco, State of California,

F. NORMAN PHELPS

a witness called on behalf of the cross-claimants.

W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire; Messrs. Wallace, Garrison, Norton & Ray, represented by Maynard Garrison, Esquire, and John R. Pascoe, Esquire, appeared as attorneys for the cross-claimant; and James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Esquire; Richard J. Archer, Esquire; and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark; represented by Richard J. Archer, Esquire, appeared as attorneys for the defendants.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the said deposition be reported

(Deposition of F. Norman Phelps.)

by Lucile Kirby, a duly qualified official reporter and a disinterested person, and thereafter transcribed by her into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Garrison: May it be stipulated that the notary need not remain?

Mr. Archer: So stipulated.

Mr. Garrison: I take it, counsel, we can stipulate that the usual provisions relating to depositions obtain; that the deposition be signed by the witness without the necessity of the notary being present and any changes made; that the deposition be filed and used in the case the same as though the stipulation had been written out; that any objection may be reserved except as to the form of the questions until the time of trial.

Mr. Archer: I take it you mean he can sign before any notary?

Mr. Garrison: Yes.

F. NORMAN PHELPS

being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Deposition of F. Norman Phelps.)

Direct Examination

Mr. Garrison: Q. Will you state your name?

The Witness: F. Norman Phelps.

Q. What is your business or occupation?

A. President of the Capitol Chevrolet Company in Sacramento.

Q. How long have you held that position?

A. Since 1946.

Q. Prior to that time what was your business or occupation?

A. Regional Manager of Chevrolet Motor Division in Oakland.

Q. Chevrolet Motor Division? What is that a division of? A. General Motors.

Q. How long had you been identified with General Motors?

A. Twenty-five years; twenty-six, to be exact.

Q. What month of the year 1946 did you become identified with Capitol Chevrolet?

A. I don't know. I think it was May.

Q. Had you had any connection with Capitol Chevrolet prior to that month of that year?

A. To the Capitol Chevrolet Company?

Q. Yes. A. Yes.

Q. What connection had you had with the Capitol Chevrolet Company prior to that month in 1946? A. My wife had an interest in it way back when.

Q. What is your wife's name? A. Alice.

Q. And she had had an interest, you say? Was that a stock interest? A. A stock interest.

(Deposition of F. Norman Phelps.)

Q. Had she held any position with the company herself? A. No.

Mr. Archer: For the record, I know there is no misunderstanding, but which Capitol Chevrolet Company are you talking about?

Mr. Garrison: There was only one in 1946; that was called Capitol Chevrolet Co., was it not?

The Witness: Yes.

Q. It was, then, Capitol Chevrolet Co.; we will refer to that to be certain.

A. No one had any interest in the Capitol Chevrolet Co. prior to 1946, because it was started in 1946.

Q. Your wife had had a stock interest in the Capitol Chevrolet Co. prior to 1946?

A. She had an interest in the Adams Service Company, which is the original.

Q. All right; fine. What is the Adams Service Company? A. What is it?

Q. Yes; I mean is it a corporation or a partnership? A. It was a corporation.

Q. Is it still in existence? A. Yes.

Q. Where was it incorporated?

A. In Nevada.

Q. Does it have a principal place of business?

A. No.

Q. Does it have an office of any kind?

A. Not at the present time.

Q. Do you have any interest in it yourself?

A. I think so, yes.

Q. A stock interest?

(Deposition of F. Norman Phelps.)

A. I think I own half and she owns half; in the original one why she owned it, and I didn't own it.

Q. Now, when was the Adams Service Company incorporated?

A. Gee, I don't remember.

Q. Approximately?

A. I can check that. Do you have that? I mean I don't really—don't know.

Q. Was it sometime prior to 1946?

A. Oh, yes; sure; that was a long time ago.

Q. Ten years; as long as ten years ago?

A. I don't remember.

Q. Five?

A. I don't remember; really I don't. I can get it for you.

Q. I understand. I just wanted to get some general idea. It was more than one year before 1946?

A. Oh, yes.

Q. Several years?

A. Several years before.

Q. When did you first acquire a stock interest in the Adams Service Company?

A. As to the date I can't tell you, but I bought into the Adams Service Company—I should have had my records on it. I don't know exactly the date.

Q. Was it before 1946? A. Oh, yes.

Q. Before you became identified with Capitol Chevrolet?

A. That is right; that is right; while I was with Chevrolet Motor Division.

Q. And you had at that time a one-half interest?

(Deposition of F. Norman Phelps.)

A. In the Adams Service, yes. I am not positive that is true. We can get the record.

Q. So that all of the time from the very beginning of the time you had any interest in Adams Service, it was one-half interest?

A. No. My wife put her own money in the original Adams Service Company. Then there was another one——

Q. There were two Adams Service?

A. I think there were two of them; and then I got in the other one at a later time. Anyway, that was an attorney's transaction. I don't remember too much about it.

Q. Well, let us see if we can get that. What was the name——

A. Couldn't he get the records? Can't you give that to him?

Mr. Archer: Well, give your best recollection.

The Witness: Well, give him the exact record on it.

Mr. Archer: If you can't remember, just say so.

The Witness: Well, I don't remember, but we can get the records and let you see them.

Mr. Garrison: Well, the exact date isn't too important to me. I am trying to get the approximate times, and if you want to refresh your memory we can stop a few minutes and you may do that.

Mr. Archer: We don't have them here.

The Witness: I can give them to you if it is important.

Mr. Garrison: Well, let us have your best recol-

(Deposition of F. Norman Phelps.)

lection and we will see if that is enough. Was the first company, then, called the Adams Service Company?

The Witness: Adams Service.

Q. There was more than one? A. Yes.

Q. And were there two?

A. Yes; only two.

Q. And as I understand you did not have any interest in the first Adams Service?

A. In the original one?

Q. The first one? A. That is right.

Q. Do you recall when that corporation was dissolved and a new one formed?

A. Exact dates I can't give you; we can get that for you.

Q. That was prior to 1946 sometime?

A. Naturally.

Q. You didn't have any interest in that first corporation? A. Not in the first.

Q. Whenever this second corporation was formed, it had the same name? A. Yes.

Q. They were both Nevada corporations?

A. Yes.

Q. And you then acquired a half interest in the second corporation? A. That is right.

Q. When it was formed?

A. Yes; when it was formed.

Q. So the first corporation ceased to exist and sometime prior to 1946 there was a second one of the same name of which you were half-owner?

A. That is right.

(Deposition of F. Norman Phelps.)

Q. Would you give me your best approximate date prior to 1946 that that second corporation was formed?

A. I can't give you it, but I can give it to you exactly out of the records.

Q. I understand that. Now, then, when you say the Adams Service Company had some interest in Capitol Chevrolet——

A. The first Adams Service?

Q. This second Adams Service? A. Yes.

Mr. Archer: Which Capitol Chevrolet?

Mr. Garrison: Capitol Chevrolet Co.

The Witness: You mean the old company?

Q. The Capitol Chevrolet Company we are talking about; the one that was in existence in 1946, at the time the Adams Service Company had some interest in the Capitol Chevrolet Company?

A. That is right; at the time that the original Capitol Chevrolet Company was dissolved; at that time, the one where all this fire loss and all that sort of stuff; the Adams Service Company at that time owned—at the time it dissolved—up before that it didn't have all of it, but when it was dissolved it had fifty per cent of the Capitol Chevrolet's stock.

Q. I see. And do you know when it acquired that stock? A. Over a period of time.

Q. Prior to 1946?

A. Yes; it had owned fifty per cent of it when the thing was dissolved.

Q. Yes, now, you think the month you went there was May?

(Deposition of F. Norman Phelps.)

A. I am pretty sure of it; it was April or May.

Mr. Pascoe: Off the record.

(Unreported discussion.)

Mr. Garrison: I notice, Mr. Phelps, in Mr. Kenyon's answer to certain interrogatories, he places the time when Adams Service had one-half interest in Capitol Chevrolet Company back as early as October first, 1942. Would——

The Witness: It is possible; if the records show that; I don't know. Anyhow, they did have one-half interest on May 31 of 1943 when it was dissolved.

Mr. Pascoe: '44?

The Witness: It says '43.

Mr. Archer: For the record, he is referring to the Resolutions, which is Exhibit A in the answer to interrogatories.

Mr. Garrison: Did you have any position with Adams Service Company other than stockholder at any time?

The Witness: No.

Q. You have never been an officer of that corporation? A. No.

Q. Who are the officers of Adams Service Company? A. I think my wife.

Q. Who was president?

A. I think my wife was.

Q. Do you know the name of the other officers?

A. I don't remember, I really don't.

Q. Yes; now, you think the month you want there was May?

(Deposition of F. Norman Phelps.)

Q. And you have never been an officer of that company? A. No.

Q. I take it that Capitol Chevrolet Company in the years '42 and '43 up to '46 while you were with General Motors, was a customer of General Motors?

A. That is right.

Q. Were they located in the territory that you——

A. ——that I was regional manager of, yes.

Q. You were in close contact with them during that year, during the years——

Mr. Archer: Just a moment.

Mr. Garrison: ——'42 to '46?

Mr. Archer: I object to this line of questioning. You can answer if you want to, Mr. Phelps, but if you don't want to answer you don't have to.

The Witness: Sure I was. In other words, I was regional manager; it took in eleven western states and Sacramento was one of the eleven western states.

Mr. Garrison: And you were acquainted with the management of the company at that time?

The Witness: Yes; knew them very well.

Q. Who was the president of Capitol Chevrolet Company, if you know, between '42 and '46?

A. Kenyon.

Q. James A. Kenyon? A. Yes.

Q. Did you hold the proxies of any of the stock of Adams Service Company during that time?

A. No.

Q. Did you vote?

(Deposition of F. Norman Phelps.)

A. I had not connection with it at all myself.

Q. Well, excepting as a stockholder of Adams Service Company?

A. You mean—Well, after this 19——

Q. I am talking about 1942 up to 1946, you were half-owner of Adams Service?

A. At some time, I did.

Q. And Adams Service was a half owner of Capitol Chevrolet? A. Well, yes.

Q. So you were a quarter——

A. At that time I—Do you have the records? There was one time when finally I had fifty per cent and Alice had fifty per cent.

Mr. Archer: I think that was in 1946.

The Witness: Was it?

Mr. Archer: Whatever your best recollection is.

The Witness: I can find out for you; if that is going to make any difference; I don't see what difference it is going to make. I don't know what you are trying to prove.

Mr. Garrison: I want to get now your best recollection, when you first acquired the one-half interest in the Adams Service Company.

The Witness: I don't remember.

Q. You haven't any idea?

A. But I will get it for you if you want; get you the exact date.

Q. All right. Did you attend meetings of the Adams Service Company? A. No.

Q. Did they have stockholders meetings?

A. I don't know.

(Deposition of F. Norman Phelps.)

Q. At any time?

A. The original Adams Service Company?

Q. No, I am talking about the second Adams Service Company.

A. I imagine so, yes; I mean I don't remember, exactly.

Q. Well, would you say you had attended a stockholders meeting or you hadn't?

A. Might have.

Q. Might have? A. Yes.

Q. You wouldn't know where that meeting might have been held?

A. I don't remember, but we can get the minutes for you and give them to you; if you had asked me for these things——

Q. This is the time when we ask for it, you see?

A. Well, if you had let me know.

Q. Now, I believe I asked you whether or not Adams Service Company had a place of business, didn't I, and you said "No"?

A. No.

Q. No office of any kind at the present time?

A. No.

Q. Did I ask you if you still owned any stock in the Adams Service Company?

A. No, I don't think you did.

Q. Do you?

A. I think that the Capitol Chevrolet Company might own some stock in the Adams Service Company, because it is still—it hasn't been dissolved.

Q. Is that your testimony?

(Deposition of F. Norman Phelps.)

A. I don't know; I really don't know whether it does or not.

Q. Well, don't you know what has happened to your stock you had in Adams Service Company?

A. No. The whole thing — Of course, I don't know much about the legal procedure, you are going through, but the whole thing is what we got the Adams Service Company started—my wife put her own money in it, and then we assumed the responsibility of the old company. It was the attorneys which your—that we had at that time from a tax standpoint and stuff like that made a lot—I didn't pay a lot of attention to it. I don't know what they were doing. I signed the stuff and went along with them, and that is the truth.

Q. Well, I wouldn't question that.

A. Well, anything else you want, what the hell? I will give it to you.

Q. We will ask you.

A. We are not trying to get out of anything; if you want these records, gosh, I can get them for you.

Q. That will be very helpful.

A. You can get them.

Q. So that the Adams Service corporation still exists?

A. Still in existence.

Q. Does it have any assets?

A. I think it has some assets.

Q. Do you know what they are?

A. I don't know, but they are only—I don't

(Deposition of F. Norman Phelps.)

know whether I should even talk about that or not. Is this going into the record now?

Q. Yes. A. Let's forget about it.

Q. Unfortunately, we want to——

Mr. Archer: Give us your best recollection; if there is anything that has to be corrected you can correct it. Just give your best recollection.

The Witness: I don't see any reason for all this; is what I don't understand.

Mr. Garrison: You have to let the judge decide whether it is reasonable or not.

Mr. Archer: Just answer Mr. Garrison's questions and we will be through in a short while.

The Witness: I don't care. I will stay as long as you want. Hell, I have been here now and had lunch and it is all right with me.

Mr. Garrison: Tell us about the assets of Adams Service.

The Witness: I don't know what they are; I really don't. I don't know what the assets are of the Adams Service Company.

Mr. Garrison: It looks like we will have to get some of the facts here. We can continue this deposition until some convenient date, but this gentleman obviously hasn't thought about this for some time and hasn't checked it and he is not prepared.

The Witness: It is a long time ago. I don't remember the things, but if there are certain records and certain things that they want, a history, I don't know why they can't have them.

(Deposition of F. Norman Phelps.)

Q. Well, we can, but I thought you would be able to tell us about that.

A. No, I don't remember all those things.

Q. Well, we can check back and talk about that later. Do you recall the fire that occurred out there in connection with Capitol Chevrolet warehousing?

A. Knew nothing about it; knew nothing about it.

Q. You heard about it, didn't you?

A. Oh, say three or four months later.

Q. Do you recall the occasion when Capitol Chevrolet Company was dissolved?

A. Do I recall the occasion when they dissolved?

Q. Yes. A. Yes.

Q. At that time were you an officer of Capitol Chevrolet Company?

A. You are talking now about the present Capitol Chevrolet Company?

Q. No, the first Capitol Chevrolet Company.

A. I was not.

Q. How did it happen that you knew about its being dissolved?

A. What? About the Capitol Chevrolet Company being dissolved?

Q. Yes.

A. Well, hell—Pardon me. We had an interest in it.

Q. It was because of the Adams Service one-half interest that you knew about it?

A. Definitely.

Q. So you were present at some of the meetings

(Deposition of F. Norman Phelps.)

in connection with the dissolution of the Capitol Chevrolet Company?

A. No, I don't think I was.

Q. You don't think you were?

A. Because at that time I was with Chevrolet Motors.

Q. Now, do you recall an agreement that was entered into for the assumption of liability of Capitol Chevrolet? A. For the new company?

Q. For the liability of the old company, Capitol Chevrolet Company?

A. From the Adams Service Company to the Capitol Chevrolet Company, is that what you are talking about? I understand that they assumed the responsibility of the Adams Service Company; yes, I knew that.

Q. Which corporation did?

A. The one prior to this one.

Q. The Capitol Chevrolet Company did?

A. The present Capitol Chevrolet Company didn't.

Q. But the first company did; the first Capitol Chevrolet Company?

A. I really don't—there are minutes of the corporation; we can check that for you.

Q. I am going to direct your attention to a paper entitled "Ratification and Approval of All of the Stockholders of the Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st day of May, 1943."

(Deposition of F. Norman Phelps.)

Mr. Archer: That is the same document which is Exhibit A in the answer of the Capitol Chevrolet Company?

Mr. Garrison: Yes.

Mr. Archer: It is the same one in the answer to interrogatories.

Mr. Garrison: Do you recall the special meeting of the board of directors on the 31st day of May, 1943.

The Witness: No, I don't, but I know this thing was handled, and I know it was—that it came up and I know that they did assume the liability.

Q. Of the Capitol Chevrolet Company?

A. That is right.

Q. Who do you refer to when you say "they"?

A. The stockholders of Capitol Chevrolet Company.

Q. That would be the Adams Service Company?

A. Adams was part of it; at that time I don't remember exactly whether I had an interest in it or not, but the records will show it.

Q. Interest in what?

A. In the one that said that they would assume the responsibility of the old company.

Q. Well, Adams Service Company said they would assume the responsibility?

A. That is right.

Q. And you were a half-owner of the Adams Service Company, you testified?

A. Was I at that time, do you know?

(Deposition of F. Norman Phelps.)

Mr. Archer: I don't remember. There are two Adams Service Companies.

Mr. Garrison: One was discontinued.

Mr. Archer: If I may make a statement for the record, my understanding is that at the time of the dissolution of the first Capitol Chevrolet Company Mrs. Phelps owned the stock of the Adams Service Company.

The Witness: That is right.

Mr. Garrison: Do you know the year of that?

Mr. Archer: I say the time of dissolution, which would be May of 1943.

The Witness: That was hers.

Mr. Archer: Yes; and at that time Mr. Phelps did not own any stock in the Adams Service Company, and I would say was not an officer of the company. That is my understanding, whatever the records will show.

Mr. Garrison: Can we get those records?

Mr. Archer: Well, in regard to the records, I don't have the records.

Mr. Garrison: Where are they?

Mr. Archer: I don't think Mr. Phelps has them. Possibly they are with Mr. Dempsey or Getz and Aiken, which is a law firm, so I don't know what the records will show. What I say I say from hearsay.

Mr. Garrison: Can I get the records?

Mr. Archer: As I say, we have tried to get them ourselves and we don't have them, and I assume we can get them, but it won't be easy for me if I

(Deposition of F. Norman Phelps.)

were to get them myself. I will say if you were to tell us what your problem is we can probably make some stipulation that will be agreeable.

Mr. Garrison: Well, I have so many problems, I don't know just how to tell you what my problems are. I would like to see the records. If they aren't available, we will have to work on——

The Witness: What do you want to know?

Mr. Garrison: Well, I will forget the point. Let us get back, then, to this ratification and approval of the assumption of liability. I take it as nearly as you can tell or recall in the light of what your counsel says, that when this assumption occurred of the liability of the Capitol Chevrolet Company, you didn't have any interest in Adams Service Company?

The Witness: That is right. I think that is correct, yes.

Q. And did you acquire some interest in the Adams Service Company thereafter?

A. That is right.

Q. Do you know when?

A. No, but we can find out for you.

Mr. Archer: If we can find out.

The Witness: I don't know why we can't, if it is going to make any difference.

Mr. Archer: Don't misunderstand; we will make every effort to get the records.

The Witness: I don't see why we can't.

Mr. Archer: Well, it is just sometime ago; that is all.

(Deposition of F. Norman Phelps.)

The Witness: Well, I think the Adams Service Company—I don't think they are denying any responsibility on this thing that they agreed to it.

Mr. Garrison: Yes.

The Witness: So I don't think—Is that one of your problems?

Mr. Garrison: That is one of my problems, yes.

The Witness: Well, I don't think that will be any problem.

Q. Who signed this resolution for the Adams Service Company?

A. I imagine my wife.

Q. You don't know?

A. No, I haven't seen it, but I can find out for you, if that is your point.

Q. That is one of them.

A. Yes, we will get it for you; the only thing it has been, as I see it now—not being a lawyer, but if the responsibility—this is prior to the fire — All right; the new company assumed the responsibility.

Mr. Archer: This is after the fire?

The Witness: Yes, but this is after the fire, but it was dissolved after the fire.

Mr. Garrison: That is right.

The Witness: Prior to that they had an obligation here, which you are arguing about. Well, the new company assumed the obligation of the old company.

Mr. Garrison: That is right.

The Witness: During the fire—Therefore; therefore, I don't see the new company—Say, all right,

(Deposition of F. Norman Phelps.)

they are responsible; Now what—Are you worried about whether or not, their ability to pay if they lose the case?

Mr. Garrison: Yes; that is one of the problems.

The Witness: Well, that is the situation.

Mr. Garrison: If they have ability to pay, we can cut this very short. Does the Capitol Chevrolet Co. have assets?

The Witness: Well, no problem; if they would lose this case—Listen; does she have to keep going all the time?

Mr. Garrison: Go ahead. We are getting right down——

The Witness: Maybe I should just answer your questions yes or no.

Mr. Archer: Mr. Garrison wants you to. I have no objection. If you will ask him the questions, Mr. Garrison, we will get the answers.

Mr. Garrison: I take it, Mr. Phelps, that there isn't any question in your mind that the Capitol Chevrolet Co., the present corporation, assumed the obligation of the first company?

The Witness: I don't think they did, no. The Adams Service Company—I don't think the present Capitol Chevrolet Company, which came in 1946, did not assume the responsibility of the Adams Service Company.

Q. It didn't?

A. No, I know they didn't. We didn't assume any responsibility that was going on in that time for a lot of reasons.

(Deposition of F. Norman Phelps.)

Q. After Capitol Chevrolet Company was disincorporated, dissolved, you operated as a partnership, I believe? A. That is right.

Q. Who were the partners?

A. I don't know.

Q. You don't know who the partners were?

A. There were one, two, three, four different companies; from a tax standpoint—Cut that thing.

Mr. Garrison: Off the record.

(Unreported discussion.)

Then, in the light of what you say, then, there isn't any question but that if there is a liability here, the present Capitol Chevrolet Company will be responsible?

A. No, they won't be responsible, but the people are the same, and I don't think there is any doubt in my mind as to whether or not that if they lose the case the thing will be paid. I can assure you there has been nothing that has been done on any of these changes to do something to get rid of my liability. You can put that in the record.

Q. But you don't——

A. Do you want me to say that or not?

Mr. Archer: That is very fine, and I know that to be the fact.

Mr. Garrison: But you do not concede the present Capitol Chevrolet Company has any liability or any of the obligations?

The Witness: Or any of the liability that they have but——

Q. I understand your statement. Now, you do

(Deposition of F. Norman Phelps.)

not know who signed this assumption of liability agreement?

A. No, I don't; it is possibly my wife.

Q. And you don't know who the partners were in the partnership?

A. No; but I can get them for you.

Q. Well, the answer is no?

A. All right.

Q. Do you know when the present Capitol Chevrolet Company was formed?

A. Yes, it was formed in 1946, formed around in May—April or May of 1946, and you——

Q. That is when you went with it?

A. That is when I went with it as president.

Q. And had no connection, no position with the company prior to that time?

A. That is right. I was with Crevrolet Motor Division. I couldn't have that——

Q. I understand. On the formation of the present Capitol Chevrolet Co., what stock interest did you have in that company?

A. Fifty per cent; my wife and I had fifty per cent.

Q. Did you have that in your own names or through the Adams Service Company?

A. At the time it was put in I don't know exactly, but those records are there. We can show you that.

Q. You did have a half interest?

A. We had a fifty per cent interest.

(Deposition of F. Norman Phelps.)

Q. Has your interest changed since that time?

A. Yes.

Q. What changes have been made?

A. In 1950 Mr. Kenyon got out and Mrs. Phelps and I own it all.

Q. You acquired his stock?

A. Yes; the company acquired his stock.

Q. The company acquired the stock, and did you acquire any stock from anyone besides Mr. Kenyon, any trust or estates?

A. He had a trust at that time. I don't know whether it was dissolved before that or not. He had a trust for his daughters.

Q. And also he had a corporation that owned——

A. I imagine so; Jim Kenyon Corporation, Company or something like that. I don't know exactly.

Q. When the liabilities of the Capitol Chevrolet Company were assumed, were you present at any of the meetings?

A. No, I told you I wasn't.

Q. You were not?

A. You mean prior to 1946?

Q. Yes.

A. I wasn't in any—I mean I couldn't be.

Q. Were you familiar with the debts and liabilities of that Capitol Chevrolet Company?

A. The old one?

Q. Yes. A. Not particularly, no.

Q. You did know there was this litigation, however, as a result of this fire?

(Deposition of F. Norman Phelps.)

A. Definitely; knew that we had assumed the responsibility.

Q. You knew that? A. That is right.

Q. You knew that when you took the position as president of Capitol Chevrolet Company?

A. That is right; that is, the old company had responsibility; that is right.

Q. And that they had been assumed and that the litigation was still going on?

A. That is right.

Q. Did you have any arrangement when you came in as president, with Mr. Kenyon regarding those liabilities?

A. No; none outside the fact that this new company that we formed didn't accept any of the responsibility of any other things that went on; anything.

Q. Did you have any documents entered into in connection with that?

A. I don't remember whether we did or not; it was just—I don't know. We didn't form any responsibility for the companies.

Q. Were there any written documents with Mr. Kenyon regarding that?

A. I really don't remember that.

Q. Did you have any conversations with Mr. Kenyon about any liabilities that might be outstanding that could be claimed against the Capitol Chevrolet Company?

A. When I came in the company I said that we shouldn't assume any of the responsibility of any-

(Deposition of F. Norman Phelps.)

thing that has been going on before that, with the new company; that is the one that started in '46.

Q. Did you have that conversation with Mr. Kenyon? A. Yes.

Q. Was anything done other than just talking about it in connection with those liabilities?

A. Gee, I don't know, really; I don't know whether there was anything written up or anything like that. I presume there must have been by the attorneys. I don't know.

Q. Did you go into the question of the assumption of liability by the old stockholders of Capitol Chevrolet Company?

A. I knew that the old Capitol Chevrolet Company had assumed the responsibility of the old Adams Company. I knew that, yes.

Q. Did you know that the stockholders of the Capitol Chevrolet Company had assumed the liability of the Capitol Chevrolet Company?

A. Now, you will have to go a little bit easy with me.

Q. All right. I think you were mistaken in the last statement. Here is what happened, Mr. Phelps. When the Capitol Chevrolet Company, the first company, was dissolved, the stockholders—Adams Service Company and Mr. Kenyon—assumed that company's responsibility.

A. That is right; I knew that; the only thing —Let me say this off the record.

Q. No, it is on the record.

(Deposition of F. Norman Phelps.)

A. Well, it doesn't make any difference, I guess, unless you don't want all this conversation.

Q. Go ahead.

A. The new company did not assume any of the responsibility; the one that started in '46; that is the only one.

Q. You said that, and I am sure you hope that. I don't agree with you.

Mr. Archer: I don't think he even hopes so.

The Witness: It doesn't make any difference.

Mr. Garrison: What I want to talk about is the assumption of liability of the stockholders of Capitol Chevrolet Company.

The Witness: The present company?

Q. The present one, Capitol Chevrolet Co. Did you inquire into the assumption of those liabilities by those stockholders?

A. I think—as I understand it, and as I remember, that the——

Q. Now, the question is did you inquire into that assumption of liability?

A. I don't know whether I did or not, but I know that they assumed it.

Q. Did you know in what manner they assumed it, whether they put up cash to pay for it or securities or how they guaranteed the payment of the liability of the Capitol Chevrolet Company?

A. I see what you are getting at. Can I go back to one thing and say the old Capitol Chevrolet Company before the prior one—I am certain that they

(Deposition of F. Norman Phelps.)

will—if they have anything against them—will pay it.

Q. That isn't my question. The question is did you make any inquiry—— A. No.

Q. ——into the manner in which the liability had been assumed by the stockholders?

A. I don't remember; I don't——

Q. You don't remember whether you inquired into it or not? A. No.

Q. You knew there were liabilities existing?

A. Yes.

Q. You knew something had been done about assuming this——

A. That is right; I knew they had assumed them.

Q. Well, you don't know how?

A. By this resolution.

Q. You don't know whether they made any provisions by posting a bond or putting up cash or securities? A. No, I don't.

Q. So that you just understand that they assumed it and accepted that, as far as you know?

A. That is right.

Mr. Garrison: Well, I think we are going to need possibly the deposition of Mrs. Phelps and certainly the records of the Adams Service Company and certainly the records of the present Capitol Chevrolet Company for the purpose of determining whether or not there were any written documents in connection with this assumption of liability, so I don't know how we can do it except to find a date that is agreeable to Mr. Phelps.

(Deposition of F. Norman Phelps.)

Mr. Archer: Let me take over now, Mr. Phelps. I would think that it would be to the interest of all parties to make this subject of the present litigation as simple as possible.

To that end I want to cooperate with your problem as I see it.

You are worried about satisfying the judgment. In my own mind, first, I have no question that there won't be such a judgment and if there is I am sure you will be able to have it satisfied.

Mr. Garrison: Why don't we make some provision for that?

Mr. Archer: My word isn't good enough for that, and in the second place, I don't have authority to make provision for that, but I think provision can be made, either by furnishing you with the evidence you require or to make some other provision.

Mr. Garrison: All right.

Mr. Archer: As far as any further deposition of Mr. Phelps——

The Witness: I will give him some more if you want.

Mr. Archer: All I am thinking about is the convenience of Mr. Phelps, as far as the documents. No documents were called for in this subpoena, and they obviously should have been called for in my opinion, because of the answers in the interrogatories, but there is no sense going along that line, because in my opinion it is a side issue in the case, but I understand your interest in it, so in order to

(Deposition of F. Norman Phelps.)

satisfy that I will take it up with those who have——

Mr. Garrison: We can simplify this very materially. All we want, all this deposition is for, Mr. Phelps, is to establish the place where we are going to get paid when we get our judgment.

If you can simplify that there is nothing to it.

Mr. Archer: I am sure we can make some provision for that by making some guarantee of the payment or, two, give you the evidence you desire.

Mr. Garrison: When do you want to do that? We have a trial coming up, and we have to amend the complaint.

Let us find a date that is convenient for Mr. Phelps to come back, for the record, and then in the meantime we will try and see if we can work this other thing out. If we can, we won't have to have the deposition.

Mr. Archer: That is agreeable.

Mr. Garrison: Let us say next Wednesday.

Mr. Archer: I won't agree to the date, but I will try to get the documents for you, as I said. My only reason is the convenience of Mr. Phelps.

Mr. Garrison: Well, let us accommodate him. What do you say?

The Witness: Gosh, I don't know.

Mr. Garrison: We are talking about your convenience.

Mr. Archer: You can go ahead and ask Mr. Phelps whatever questions you want and take whatever procedure you want. I don't mean that I am

(Deposition of F. Norman Phelps.)

retracting the former statement. I think we can settle this in short order. I am telling you to do that so you won't be relying on my word for anything of this nature.

Mr. Garrison: I would like to have a date set for the completion of the deposition. If you don't want to do that we will go out and get an order of the court.

Mr. Archer: I think at the present time—I don't think you are entitled to take his deposition, willy-nilly.

Mr. Garrison: Do you want to ask any questions that I haven't touched upon?

Mr. Pascoe: Only in connection with this—Mr. Archer says he can assure us that he can furnish some sort of security——

Mr. Archer: Or the records.

Mr. Pascoe: That will avoid the necessity of our going into all this with Mr. Phelps. It would also, I take it, take away the necessity of filing an amended complaint and might simplify the entire procedure.

That still, of course, would leave us with primary issues.

Mr. Archer: Don't let my statement deter you from taking any steps in the legal matter that you should undertake.

Mr. Garrison: What I meant is, do you have any questions?

Mr. Pascoe: No.

Mr. Garrison: That is all for the moment.

(Deposition of F. Norman Phelps.)

Mr. Archer: I have one question.

Examination by Mr. Archer

Mr. Archer: Mr. Phelps, have you been testifying from any documents here during your deposition here?

The Witness: No, I haven't seen any documents.

Q. I refer you to the answer and interrogatories which have been filed in this case. Have you referred to any other documents beside those?

A. No.

Mr. Archer: That is all. You have been using your best recollection?

A. That is right; and when I told you I didn't remember, I didn't remember.

Q. If the documents showed otherwise, the documents would control?

A. Naturally they would, which I tried to explain. You understand that?

Mr. Garrison: Yes.

/s/ F. NORMAN PHELPS

United States of America,

Northern District of California,

City and County of San Francisco—ss.

I hereby certify that on the 14th day of February, 1952, at 2:00 o'clock p.m., before me, Selma R. Conlon, a notary public in and for the City and County of San Francisco, State of California, at the office of Messrs. Morrison, Hohfeld, Foerster, Shuman &

Clark, Crocker Building, 620 Market Street, San Francisco, California, personally appeared, pursuant to subpoena, F. Norman Phelps, a witness called on behalf of the cross-claimant; and W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire; Messrs. Wallace, Garrison, Norton & Ray; represented by Maynard Garrison, Esquire, and John R. Pascoe, Esquire, appeared as attorneys for the cross-claimant; and James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Esquire; Richard J. Archer, Esquire; and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark; represented by Richard J. Archer, Esquire, appeared as attorneys for the defendants; and the said F. Norman Phelps, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Lucille Kirby, a duly qualified official and disinterested shorthand reporter, and was transcribed by her.

And I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him; and that the deposition is a true record of the testimony given by said witness.

And I further certify that the said deposition has

been retained by me for the purpose of securely sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In testimony whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 3rd day of March, A.D., 1952.

[Seal] /s/ SELMA R. CONLAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed March 4, 1952.

[Title of District Court and Cause No. 30473.]

DEPOSITION OF ALICE PHELPS

Be it remembered that on Monday, the 25th day of February, 1952, at 10:30 o'clock a.m., pursuant to stipulation between counsel for the respective parties, at the residence of Mrs. Alice Phelps, 5117 Proctor Avenue, Oakland, California, personally appeared before me, Robert B. Manners, a Notary Public in and for the City and County of San Francisco, State of California,

ALICE PHELPS

a witness called on behalf of the cross-claimant herein.

W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire and Messrs. Wallace, Garrison, Norton & Ray, represented by Maynard Garrison, Esquire, appeared as attorneys for the cross-claimant; and

James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Esquire; Richard J. Archer, Esquire, and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, represented by Richard J. Archer, Esquire, appeared as attorneys for the cross-defendants.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated that the said deposition should be recorded stenographically by Robert B. Manners, a competent official shorthand reporter and a disinterested person, and thereafter transcribed into longhand typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that the oath be admin-

istered by Robert B. Manners, a notary public in and for the City and County of San Francisco, State of California, and that the deposition might be signed before any notary public.

Mr. Garrison: Counsel, may it be stipulated that this deposition may be signed before any notary public and that objections may be reserved until the time of trial, except for the form of the question, and that Mr. Manners may administer the oath to the witness?

Mr. Archer: So stipulated.

MRS. ALICE PHELPS

called as a witness on behalf of the cross-claimant herein, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Garrison: Q. Will you state your name, please, Mrs. Phelps?

A. Alice Phelps.

Q. Mrs. Phelps, you are the wife of Mr. F. Norman Phelps? A. Yes.

Q. You have at some time or another had some connection with two corporations known as the Adams Service Company? A. Yes.

Q. And am I correct in my statement that there were two corporations? A. I don't know.

Q. You do know that there was at least one, do you? A. Yes.

(Deposition of Mrs. Alice Phelps.)

Q. Did I state the name correctly; Adams Serv- Company? A. Well, I wouldn't know.

Q. When did you first become connected with the Adams Service Company?

A. I have no idea; I don't remember.

Q. Can you give me any approximate date?

A. No, I really couldn't.

Q. You could not. Was it sometime prior to 1946? A. Why, it must have been.

Q. And were you an officer at that——

A. I think I was.

Q. Do you know what office you held?

A. I think I was president.

Q. Was that a corporation?

A. I don't know.

Q. Do you know where it was formed or incorporated?

A. No, I really don't.

Q. Did you own any stock in the company?

A. Well, I—I did, yes; I presume I did.

Q. Do you know how much stock you owned in relation to the total stock?

A. No, I don't.

Q. Do you still have any stock in it?

A. I don't know.

Q. You do not know. Did you, as president of the corporation, perform any duties for the corporation? A. No.

Q. Did you sign any documents in connection with it?

A. Well, I—I presume I did.

(Deposition of Mrs. Alice Phelps.)

Q. You have no recollection as to whether you did sign any or did not?

A. No, I don't remember.

Q. Who advised you with respect to what you did in connection with the corporation? Did anyone give you any advice regarding it, or instructions?

A. Well, what do you mean?

Q. Well, if you were president I assume you had some functions to perform and I am wondering if you did not know about them or whether anyone advised you regarding them.

A. It was handled through the attorney.

Q. And do you know who that attorney was?

A. Mr. Getz, wasn't it?

Q. Mr. Getz of Los Angeles? A. Yes.

Q. Did Mr. Getz represent you from the beginning of the corporation?

A. Well, I don't remember.

Q. You do not remember it. When did you first learn that Mr. Getz was advising you or handling the affairs of the corporation? Could you recall that? A. No.

Q. Sometime prior to 1946? A. Yes.

Q. As far as you can recall, then, you never did anything insofar as the duties of the president of the corporation were concerned?

A. I don't remember that I did.

Q. You do not recall having performed any duties. Do you know what the assets of the corporation were?

A. No, I do not.

(Deposition of Mrs. Alice Phelps.)

Q. Do you know whether it has any assets now?

A. No, I do not.

Q. I gather then, that whatever you did in relation to that was done under the advice of your attorney and you paid no attention to the details?

A. That's correct.

Q. You signed some documents, if you did sign any, and they were handed to you and you signed them without paying any attention to what they were? A. Yes.

Q. And there might have been two—you do not know, but there might have been two Adams Service companies? A. I don't remember.

Q. All right. Are you acquainted with a corporation known as the Capitol Chevrolet Co.?

(No answer.)

Q. For your information, that is the present Capitol Chevrolet Co., as distinguished from its predecessor corporation; the Capitol Chevrolet Company—"Co." being the abbreviation of "Company."

A. Yes.

Q. You are familiar with the Capitol Chevrolet in Sacramento, of course—the one your husband is president of? A. Yes.

Q. And you have some stock in that corporation?

A. Yes.

Q. I believe you have one-half of the stock?

A. I think so.

Q. Now, do you know when that corporation was first formed? A. No.

Q. Did you know that there was a predecessor

(Deposition of Mrs. Alice Phelps.)

Capitol Chevrolet Company by that name, another corporation before this present one?

A. Yes.

Q. And did you have any stock in that corporation? A. I don't think so.

Q. You do not think you did. Do you know when you first acquired any interest in either the first or the second Capitol Chevrolet corporations?

A. No.

Q. Do you know what happened to your stock in the Adams Service Company?

A. No, I do not.

Q. Do you recall signing a document called an assumption——

(Addressing Mr. Archer): By the way, do you have that, Mr. Archer?

Mr. Archer: Yes, I have it. I will state for the record——

Mr. Garrison: Q. Mrs. Phelps, I will show you a piece of paper with some typing on it, entitled, "Ratification and approval of all of the stockholders of Capitol Chevrolet Company of the resolution adopted at the special meeting of the Board of Directors of the Capitol Chevrolet Company on the 31st day of May, 1943." I wish you would look at that and see if you can recall such a document as that and whether or not you have ever seen it and whether or not you ever signed it.

(Handing document to witness.)

A. I don't remember.

Q. You do not remember it. Now, do you recall

(Deposition of Mrs. Alice Phelps.)

the time in 1943 when the first Capitol Chevrolet Company was dissolved? A. No, I do not.

Q. Do you recall any discussions with anyone, your attorney or your husband, regarding any liabilities of that company? A. No, I do not.

Q. And is it your memory that you did not have any stock in the Capitol Chevrolet Company, the first Capitol Chevrolet Company?

A. I don't remember.

Q. You do remember, however, having stock in the Adams Service Company? A. Yes.

Q. Did the Adams Service Company own any stock in the Capitol Chevrolet Co.?

A. I do not know.

Q. I think I asked you this, but do you know what happened to your stock in the Adams Service Company? A. No, I do not know.

Q. Are you still an officer of the Adams Service Company? A. I don't know.

Q. Does the Adams Service Company have an office? A. Not that I know of.

Q. Did it ever have an office?

A. I don't remember.

Q. Well, you would have known if it had an office, would you not?

A. Well, I don't know.

Q. Were you ever in it?

A. No, I was never in it.

Q. Did you ever attend a board of directors' meeting of the Adams Service Company?

A. I don't remember that I did.

(Deposition of Mrs. Alice Phelps.)

Q. Does it have any books or records?

A. Not that I know of.

Q. Well, were you present when you were elected president? A. I don't think so.

Q. Did you ever see any books or records of the Adams Service Company?

A. No, I never saw any.

Q. And if they are still in existence, you do not know where they would be? A. I do not.

Q. Do you know of any assets that the Adams Service Company had?

A. No, I don't.

Q. Well, where did you talk with Mr. Getz regarding the affairs of the Adams Service Company?

A. I don't remember.

Q. Do you remember having met Mr. Getz?

A. Oh, yes.

Q. Do you know where?

A. In Los Angeles.

Q. In Los Angeles. In his office or at your home, or—— A. Oh, I met him many times.

Q. Oh, you have met him many times? Did you discuss the affairs of the Adams Service Company with him? A. No.

Q. Were the meetings social, or were they business?

A. Mostly social.

Q. Mostly social. And he did give you some advice regarding the Adams Service Company, did he not? A. No, no, no, he didn't.

Q. Well, did anyone? A. No.

(Deposition of Mrs. Alice Phelps.)

Q. Did your husband talk to you about it, or——

A. Yes.

Q. (Continuing): ——discuss it with you?

A. Yes.

Q. Well, when you became president and were president, if you signed any papers in connection with being president, who would have told you to sign them? A. My husband.

Q. In other words, this was an activity on your part as the wife of Mr. Phelps and you did whatever you did according to his direction?

A. Yes.

Q. And so far as you presently know, you have no recollection about the details of any of those things at all?

A. No, I don't.

Q. Have you told me as much as you can recall about your relationship to the Adams Service Company or the Capitol Chevrolet Company?

A. Yes, I have.

Q. And they are just names in your mind and there is nothing else you can remember about it?

A. Yes.

Q. You did not talk to any attorney about it?

A. No.

Q. And whatever you did in relation to it, you did under the direction of your husband?

A. That is correct.

Q. I may have asked you this, but are you an officer of the Capitol Chevrolet Co. at the present time? A. I don't know.

(Deposition of Mrs. Alice Phelps.)

Q. Have you ever been?

A. I don't remember.

Mr. Garrison: I think that is everything, thank you very much.

Mr. Archer: I have no questions.

/s/ MRS. ALICE PHELPS

State of California,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on Monday, the 25th day of February, 1952, at 10:30 o'clock a.m., before me, Robert B. Manners, a notary public in and for the City and County of San Francisco, State of California, at the residence of Mrs. Alice Phelps, 5117 Proctor Avenue, Oakland, California, personally appeared pursuant to stipulation between counsel for the respective parties, Alice Phelps, a witness called on behalf of the cross-claimant herein; and W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire, and Messrs. Wallace, Garrison, Norton & Ray, represented by Maynard Garrison, Esquire, appeared as attorneys for the cross-claimant; and James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Diebert & Kumler, Herbert W. Clark, Esquire; Richard J. Archer, Esquire, and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, represented by Richard J. Archer, Esquire, appeared as attorneys for the cross-defendants; and the said Alice Phelps being by me

first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by her deposition hereto annexed.

And I further certify that the said deposition was then and there recorded by me, a duly certified official reporter and disinterested person, and was transcribed by me; and I further certify that at the conclusion of the taking of said deposition.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel nor financially interested in the action.

In testimony whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 3rd day of March, A.D. 1952.

[Seal] /s/ ROBERT B. MANNERS

Notary Public in and for the City and County of San Francisco, State of California.

State of California,
County of Alameda—ss.

I, R. C. Anderson, a Notary Public in and for the County of Alameda, State of Californa, duly commissioned and qualified to administer oaths, do hereby certify that the witness in the foregoing deposition named Alice Phelps, appeared before

me on the 4th day of March, 1952, and that said deposition was submitted to the said witness for reading, correcting, and signing, and being by her read and corrected by her in all particulars she desired (such corrections being initialed by me) was by her subscribed in my presence and sworn to before me as such notary public.

And I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In witness whereof, I have hereunto set my hand and affixed my seal of office, this 4th day of March, 1952.

[Seal] /s/ R. C. ANDERSON

Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Causes 23171-30473.]

REPORTER'S TRANSCRIPT

Wednesday, March 6th, 1952

Before: Hon. Louis E. Goodman, Judge.

Appearances: For Cross-Claimant: Lawrence Warehouse Company: Messrs. Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., and John R. Pascoe, Esq. For Cross-Defendants: James B. Isaacs, Esq., and Messrs. Dempsey, Thayer, Dei-

bert & Kumler; Herbert W. Clark, Esq., Richard J. Archer, Esq., Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark. [1*]

The Clerk: R.F.C. vs. Capitol Chevrolet Company and Defense Supplies Corporation vs. Lawrence Warehouse Company, consolidated for trial.

Mr. Garrison: Ready for the cross-claimant.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Garrison: For the cross-claimant Lawrence Warehouse Company, the firm of Wallace, Garrison, Norton & Ray, by Maynard Garrison and John Pascoe.

Mr. Archer: For the cross-defendants James B. Isaacs and Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Richard J. Archer, and Morrison, Hohfeld, Shuman and Clark.

The Court: Proceed.

The Clerk: Counsel, do you wish to file these depositions as we go along?

Mr. Garrison: Yes; I will mention them as I go along.

I think, your Honor, the best way to take up where this case left off in 1944 would be for me to make a short opening statement to bring us up to date on the developments since that time to be sure that we have the situation pretty well before us, and then argue the legal problems as your Honor might think necessary.

I might say in this connection that, as the cross-claimants [2] in both the original case No. 23171,

and the second case consolidated, we do not intend to introduce any evidence by way of testimony. We will present for the file and for filing the interrogatories that have been taken and the depositions that have been taken, and it is our position that, with the evidence in the original case, that will be sufficient for the purpose that we seek here.

I know your Honor has heard a good deal about this case—more than probably it was your wont—and I shall not burden the time of the court with a repetition of many of the factual situations which I am sure are clear in your Honor's mind. I do think, however, that there are three or four essential pieces of evidence in the record which I think ought to be mentioned at this time, and I will do so as briefly as I can.

Mr. Archer: May I interrupt just a moment? It may be a little bit difficult from what you say to tell when you finish your statement and when you are introducing evidence. If you will just distinguish——

Mr. Garrison: We will try to make that clear.

As I said, we are here today with two consolidated cases: the first, 23171, which is the original action, and then 30473, which is the case that originated as a result of the Supreme Court's suggestion that Defense Supplies or Reconstruction Finance Corporation should sue on the [3] judgment that they obtained in this Court. I don't know why the Court suggested that, because they had a judgment and could have executed on it. But the Supreme Court did say that they should proceed to sue on

the judgment, and the Defense Supplies Corporation did sue on that judgment as a separate proceeding from the original litigation. And when they served us, we, in due course, cross-claimed in that case as we had in the original case, and that is the way in which we happen to have two cases here to some extent overlapping.

I think that it would be expeditious at this point to confine the first part of what I have to say to 23171, the first case and our first cross-claim, because in that cross-claim we are concerned only with one principal defendant, corporate defendant; in the second case we are concerned with a number; and it seems to me it would be easiest for us to get it into our minds again if we first took up 23171 and then the second case.

Your Honor will recall that at the conclusion of that first case by the Government, it was felt by counsel, as expressed to your Honor, that if the defendants were successful in that litigation and the case decided against the Government, there wouldn't be anything to litigate between the defendants, because there wouldn't be any indemnity problem arise; and for that reason we agreed with your Honor [4] that the matter of the cross-claim be held in abeyance until the principal litigation was decided finally and that thereafter the defendants could litigate their problems between themselves. So now that that first litigation, the prinicipal complaint, has been decided and the judgment rendered and paid, we now come back just as though we were

proceeding back in 1944 to consider the cross-claims between the defendants.

I might say in connection with that litigation, there is a daily transcript in the file, so that if your Honor does not have all of the evidence which was introduced in your mind, it is available for you in that form; all of those exhibits are of course preserved; and there is likewise a Clerk's transcript which is printed and a little easier to handle that was used on the appeal; but insofar as 23171 is concerned, all of that evidence introduced in the main case is before you and available.

A few points of importance which I think we should have clearly in our mind are:

First, the master contract between Defense Supplies and Lawrence Warehouse providing for the warehousing of these tires in a large area. That document is part of the evidence.

Secondly, the contract between Lawrence and Capitol Chevrolet Company, its agent, for the storage on behalf of Lawrence Warehouse of the tires in a restricted or limited [5] area, in this case Sacramento. And that contract is likewise in evidence, and the section of it, paragraph II which is in point, reads as follows: "To furnish suitable"——

Mr. Archer: Your Honor, I wonder if we are going into the evidence now or still in the opening statement. It of course is our position that the evidence which counsel is referring to is not in the case. That has been our contention, as you know on the pre-trial conference, that it has been merged in a final judgment. So I don't know whether we are

going into the evidence now or whether this is an offer of evidence, or whether it is still the opening statement. If it is the opening statement, I object to it for the reason——

The Court: Your point is that the court cannot consider in this case the evidence that was before the court in the trial?

Mr. Archer: Yes, that is right, your Honor.

The Court: Why?

Mr. Archer: Because it has been merged. Just as the preliminary negotiations leading up to a contract can no longer be proved when you reach a final contract, I have the authorities which say that the proceedings of a trial when merged into a final judgment cannot be proved unless the judgment is ambiguous. And I am prepared to prove that there is no ambiguity in this judgment.

The Court: As I remember, the parties had agreed that [6] this particular matter should await the determination of whether or not there was liability at all to the plaintiff.

Mr. Archer: Well, you may be correct, your Honor, but I think that they said that there would be another trial. If I may refresh your Honor's recollection, the matter came on for trial before you rendered judgment but after you had written your opinion, the matter did come on for trial and it was set off calendar. I have seen no order that the evidence in the one would be the evidence in the other. In other words, as between Lawrence Warehouse and Capitol Chevrolet Company no evidence has been introduced.

The Court: At any rate, the evidence as to what occurred is in there. Is it your idea that all of those witnesses would have to be called over again to testify?

Mr. Archer: No; it is my position, your Honor, that you have a judgment, findings of fact and conclusions of law, and that is it. I would object if they offered to call witnesses, because, as I say, it has been merged, and I am prepared to support that with authorities.

The Court: I remember your argument on that. That judgment was against Capitol Chevrolet Company, and the Lawrence Warehouse Company, and McGrew, cross-defendants.

Mr. Archer: That is right, your Honor.

The Court: And your argument was, as I remembered at that time, that since that was a judgment against all of the [7] parties, that it held all parties liable——

Mr. Archer: That is right.

The Court: ——and that, therefore, your point was that that foreclosed the right of one to proceed against the other.

Mr. Archer: That is right.

The Court: Of course, generally I think that may be true, except for the fact that the parties agreed that there was to be separate litigation between the parties one against the other on a cross-complaint which was then on file.

Mr. Archer: Well, I don't know; as far as I have been able to determine, there is nothing to that

effect in either the minute book or the records of the case or in the transcript.

The Court: I don't know where I could have gotten the idea from if it did not transpire in Court.

Mr. Archer: Pardon?

The Court: I say, I don't know where I could possibly have gotten that idea if it wasn't so stated at the time.

Mr. Archer: Well, I have read the transcript, your Honor, and if there is something to that effect it should be in the transcript, or as I referred to, the minute order, but I don't think there has been any agreement as to what is evidence and what is not evidence. The general rule is that evidence in one trial is admissible only on the same [8] points on which there has been a right to cross-examine.

Mr. Garrison: I think, your Honor, we will get to those legal points, if he raises them in the proper order, and I would like to go along. I think when they come up we will be prepared to present the authorities to meet his authorities.

The Court: I think the point that your opponent is making is a legal question.

Mr. Archer: I wanted to know so I could make an objection if this were evidence.

Mr. Garrison: We are in this position: We have a case, 23171, that case right there, which had a complaint filed, an answer filed, and cross-claims filed. Your Honor passed and decided on the principal complaint, and the cross-claims have never been decided, and they were specifically reserved, as I understood it, for trial at a later date. So we

have a cross-claim in that case which has never been decided and the issues have never been litigated. What we are doing now is proceeding to complete that trial and try the cross-complaint.

Mr. Clark: If your Honor please, might I interrupt? Mr. Archer has presented a point, but I want to be sure, if the Court please, that this record is clear. May I ask, through the Court, a question of counsel to clarify the position we are in now. We don't know whether to object or not. If counsel is making an opening statement, that is one [9] thing. If he is also independently introducing evidence, that is an entirely different thing. If he is making both an opening statement and introducing evidence, that is a third thing. And I think the defendants are entitled to know precisely what it is that counsel is intending to do here so that we will be in a position to make our record. If it is an opening statement, we will remain quiet while it is being made. If he is introducing evidentiary matter, that is an entirely different matter.

Mr. Garrison: I of course can——

Mr. Clark: Counsel can tell us what he is doing, but he hasn't done it.

Mr. Garrison: I didn't think it was necessary.

Mr. Clark: We won't waste the time of the Court at all if counsel would just say precisely what he is doing here.

Mr. Garrison: I will be glad to say exactly. I thought I did.

The Court: Suppose you have that in mind.

Mr. Garrison: Yes.

The Court: I have a request for some advice from the Grand Jury. I will have to take a very brief recess.

(Recess.)

Mr. Garrison: I believe your Honor has a copy of the Clerk's transcript before you. [10]

The Court: Yes.

Mr. Garrison: If you will look at page 75—that happens to be a portion of your Honor's opinion rendered at that time, and if you will read the top of page 75——

The Court: Yes.

Mr. Garrison: On the basis of that opinion, it is our position that we are in exactly the same situation today as if we had proceeded the next day after the plaintiff finished its case on the cross-claim issues. And of course under those circumstances, every bit of the evidence and the exhibits introduced in that litigation would be before your Honor, because it is the same case. This only is a cross-claim in that same litigation. And it is inconceivable to me that counsel can suggest that the evidence in a piece of litigation where there is a complaint and a cross-claim is not in the record for all purposes including the issues on the cross-claim.

The Court: Well, why don't you just offer that and let counsel make his point?

Mr. Archer: Is this an offer or the opening statement?

Mr. Garrison: I didn't think that it needed to be offered, because it is in 23171, being the case that we are on trial on, on the trial of the cross-claim.

The Court: Then move the court that the record be offered as part of the record in the instant issue, in [11] connection with the instant issue and give counsel an opportunity to make his objection for the record.

Mr. Garrison: I move that the record of evidence, the transcript in 23171, be before your Honor at this time in connection with the cross-claim that is a part of that proceeding, and that it be considered by your Honor in connection with the issues which have not been litigated in that case on the cross-claim.

Mr. Archer: You are offering it only as to 23171?

Mr. Garrison: Yes.

Mr. Archer: I object on the ground that it is incompentent, irrelevant and immaterial, and on the additional ground that it has been merged in a final judgment and conclusions of law on findings of fact, and on the additional ground that it is res inter alios.

The Court: On the ground that the court specifically reserved jurisdiction to determine the issues in the cross-action, I will overrule the objection.

Mr. Archer: May I state, your Honor, we have no argument with having this case come on for trial, but we do have argument as to what will be the evidence at that trial. I admit you reserved jurisdiction to try this case, but I don't think you reserved any right to consider any evidence.

Mr. Clark: You couldn't have done that.

The Court: What you are saying amounts to

this: That [12] if it were necessary to determine the rights and liabilities of the parties on these cross-actions, that the court would have to hear all this evidence over again and have it re-introduced, and all of the documents that were introduced at the other hearing.

Mr. Archer: Well, that may be one aspect of what I am saying, but I think that the law is clear between an indemnitee and an indemnitor——

The Court: You may be entirely right as a matter of law, but I see no reason as a matter of procedure, that the court has to go through the vain act of resubmitting the testimony of these witnesses and of re-introducing the documents in evidence. The legal effect may be quite as you say, but as a matter of procedure, I don't think that there is any need to be wasteful of time and duplicative of the evidentiary matters.

Mr. Archer: Your Honor, I am contending precisely this: When this case came on, it was the case of the Defense Supplies Corporation, and they had the right to sue whomever they chose and present their evidence without any question as between the defendants. Now as a matter of fact, that did not happen, but they could have. What your Honor is saying is that Capitol Chevrolet Company could have objected to evidence offered by the Defense Supplies Corporation on the ground that as between Lawrence and Defense Supplies [13] Corporation it was not admissible. That is not true. The issue then, as far as Capitol Chevrolet Company was concerned, the only objections it could make and the

only cross-examination it could conduct, was on the issue of whether it alone was liable to Lawrence Warehouse Company. It couldn't cross-examine on any of these other issues.

The Court: Of course that would entail only a question of law, wouldn't it?

Mr. Archer: Why, it is a question, if we didn't have the right to cross-examine, then it is hearsay, your Honor, and that is a question of evidence and res inter alios.

Mr. Garrison: I don't think counsel has read the new rules of procedure.

Mr. Clark: I think we have authorities to support this position, if the Court please, and it is a highly important situation in the case.

Mr. Archer: What your Honor is saying is that when this case came on for trial, Mr. Getz representing the Capitol Chevrolet Company could have objected to evidence on the ground that as between him and Lawrence Warehouse it was not admissible. Well, he certainly couldn't embarrass Defense Supplies in the case.

The Court: It is my recollection that some place in the transcript in this case there was a statement by counsel which prompted me to make the ruling as to retention of [14] jurisdiction and that the parties would go on with the case——

Mr. Garrison: At a later date.

The Court: ——after determination of liability to determine claims one against the other.

Mr. Archer: Your Honor, I am not saying that that is not true. I am saying Lawrence Warehouse

has a right to bring this action against us. They certainly have the jurisdiction; they don't have to file a new complaint and get out a new summons, but there has been no agreement as to what the evidence is.

The Court: Is it your contention that all circumstances in connection with the fire and so forth would have to be represented to the court on these cross-complaints? I understand that from what you are saying, because you have just said that there was no opportunity to cross-examine by the Capitol Chevrolet Company on evidentiary matters that would have a bearing upon any liability of Capitol Chevrolet Company to Lawrence Warehouse Company. So I take it that if what you are saying is true, that then all of that evidence has to be taken over again to permit that right of cross-examination by the Chevrolet Company with respect to any claim of liability on its part to the Lawrence Warehouse Company.

Mr. Archer: On the basis on which the offer was made, your Honor, in this case at this time I would say you are right. I don't think that that is necessarily so, because as [15] I said before, you have a judgment, and findings of fact and conclusions of law on the relationship between the parties, but the offer was not made in that respect.

The Court: You mean——

Mr. Archer: ——with the offer made it was.

The Court: You mean the findings can be taken into account but not the evidence?

Mr. Archer: The judgment, your Honor. I would

say the judgment is the real integrated document. In some cases I am prepared to show you can go to the findings and conclusions.

The Court: That I understand is a question of law. It may be still good, but if I were to rule out now any record to be made in the case, then you might find yourself worse off if you won the case on the question of law, than you would if the Court had permitted a complete record and then determined as a matter of law in your favor.

Mr. Archer: I understand. I think we will win either way.

The Court: That is pardonable enthusiasm, but nevertheless——

Mr. Garrison: It is shared by both sides.

The Court: Nevertheless, I don't think that it would be proper for the Court to rule as a matter of law that the only thing that counsel can present is the judgment. That is what you are saying. [16]

Mr. Archer: That is right, your Honor.

The Court: I am going to allow the whole record in. Your objection is noted, your point is made. Anybody looking over it would not have any misunderstanding as to the nature of the point raised. You still have the perfect right to argue that despite the fact that the record is in, that the Court is nevertheless confined to the judgment, so that there is no harm done to anyone in that connection.

Mr. Archer: Your Honor, of course we opposed the consolidation in this case. I notice there was a formal order prepared, and I would like to note for the record we opposed it.

Mr. Garrison: I am not saying that you did not.

Mr. Archer: Just for the record.

Mr. Garrison: It is in the record.

Mr. Archer: This evidence has only been offered in 23171. The final remark I would have to make is that I know of no law written any place that would allow evidence in as against a defendant for the purposes for which it has been offered.

The Court: After they get the whole record in, then you may make motions and reserve the right to do that; and if it appears as a matter of law at that time that the only basis upon which the Court can determine this case is on the basis of the judgment of the case and that is the law, I will so [17] hold. But I am not going to make the ruling in advance.

Mr. Archer: Very well.

The Court: I think that fully protects your rights.

Mr. Archer: Now I wonder, to get back to the other question, if we are starting with the evidence. I think before the evidence is presented, if that is what you are doing, I have some documents—for instance, the Phelps' answers are not due until tomorrow. Two additional defendants were served in the other case, 30473. Their time——

The Court: Let's wait until we get to that case; counsel, I understand, are offering it only in the one case.

Mr. Garrison: 23171.

Mr. Archer: Aren't we offering evidence in 30473?

Mr. Garrison: No, I am only offering——

The Court: Let counsel get through, and when he is through——

Mr. Archer: Is this just an opening statement?

Mr. Garrison: I don't think I have to be interrogated by counsel.

Mr. Clark: I wish to have it understood that we are going to make the record here whether counsel likes to be interrogated or not.

The Court: Let's not get into a quarrel about it, gentlemen. You are making it extremely difficult for me to follow with any clarity the presentation of the matter. [18] There are competent counsel on both sides, and each side will be given their opportunity. I am not going to brush anything aside one way or another. The only point the court has made thus far, I want the record made first, then you may argue the matter on both sides and make any motions you want to your heart's content. Let's each one give the other a chance to do that. Therefore, so the record will be straight, you have made a motion, which I have granted, to let the record in that case be considered as part of the record in this case. In admitting that I have done so over the objections stated by counsel on the other side, without prejudice to their right to move to strike that record if it appears when the case is concluded that it is not properly before the court.

Mr. Garrison: Thank you, your Honor. I think they would have the right to make that motion at any time. And I might say, for their information, that I view what I am saying now as an opening

statement. I take the position that the evidence already in this case, 23171, is in it whether I moved it or the court orders it or anything else, it is in the case, and it is in for all purposes. And I am certain the law is very clear on that.

If I may resume. I have said that the important factual items which are in this evidence already are, first, the main contract, and, secondly, the contract between Lawrence [19] and its agent Capitol, and that contract in paragraph 2 provides that the agent is "to furnish suitable storage space for the storage of such tires and tubes as may be delivered to agent to the total available capacity of agent."

The Court: Read that again. I missed it.

Mr. Garrison: It says, "to furnish suitable storage space"—Capitol is—"for the storage of such tires and tubes as may be delivered to agent"—Capitol—"to the total available capacity of agent."

Paragraph 3: "To store and safeguard the storage of such tires and tubes as are received by agent."

Paragraph 8: "To indemnify the principal against loss or damage resulting from a failure on the part of the agent to perform any of the duties or obligations above set forth."

In connection with that contract it ought to be noted that the only express right given to Lawrence under the contract is to inspect Capitol's records. Beyond that it has no right to direct its actions in connection with the storage of tires.

Another bit of evidence that I think is important is the written instructions that were furnished by

the Defense Supplies to both Lawrence and its agent Capitol that they were not to allow anyone in those premises for any reason [20] whatsoever. I take it that involved security, national defense, as well as fire, and so forth.

A list of persons who were approved was furnished to Capitol by Defense Supplies. That list is in the record, enumerating certain individuals, government officials and so forth. Not even Lawrence was listed as approved to enter the premises of Capitol Chevrolet.

Then of course the evidenec is in the record that the owner of the building sent a note, and Mr. Kenyon of Capitol Chevrolet made the arrangements, for the man to go in the building,—a man who was not permitted in under the list of approved persons; arranged for him to go in there with the acetylene torch and the fire started. And the contention at the time of trial, and our contention now, is that the negligence in this case is the negligence of Capitol in permitting an unauthorized person to go in first, and, secondly, not taking any precautions whatever to see what he was doing there or that he had facilities to prevent fire, and so forth, and the further fact that Lawrence had not even knowledge of that action until it was over and the fire had occurred.

I believe the thing that Mr. Archer is talking about in this preliminary discussion is the same thing that he has alleged in his answer, and that is that your Honor has found in the findings in the first case that the negligence of [21] Lawrence and

Capitol joined and concurred to create the loss. And I believe the principal defense in this case that they have suggested thus far is that regardless of the fact of whether or not Lawrence was negligent, that by reason of your Honor's having signed those findings, that you and all of us are hereafter forever precluded from rendering any judgment in the case on the merits and that finding is binding on you in this proceeding on the cross-claim.

The Court: That is finding No. 6 in the findings?

Mr. Garrison: Yes.

The Court: "That the negligence of the defendants McGrew, Lawrence Warehouse and Capitol Chevrolet concurred and joined together to destroy plaintiff's goods."

Mr. Garrison: Yes. Now he says this morning, as I understand it, that by reason of that finding and judgment, that all of this has been merged in there and that if we were negligent, or, rather, regardless of whether we were negligent, that finding precludes you now from a judgment in favor of us against our agent indemnitor.

The Court: Well, he has urged that point.

Mr. Garrison: He has urged it right along. That is the legal point in the case which we are prepared to meet, and I propose to go into it right now.

The Court: As I remember the argument that was made [22] heretofore in the matter, it was claimed that if there was joint negligence, there would be no right——

Mr. Garrison: Joint tort feasors, no right to——

The Court: No right of recoupment. Your con-

tention was that you are claiming on the basis of some indemnity agreement.

Mr. Garrison: Yes, we have a number of reasons.

The Court: It seems to me that the whole matter is only a question of law. However, I think you should make your record clearly.

Mr. Garrison: Yes. I think that matter is a question, as I argued at the time of the pre-trial conference, that we should decide on the motion for summary judgment; but they said there were questions of fact, so we are here today to hear their questions of fact. And I may say in that connection——

The Court: Really the only question in the case —maybe I am over-simplifying it, I don't know —is whether or not——

Mr. Garrison: Whether we are barred by that finding.

The Court: ——whether with the finding here involved, you have any right to recover against the Chevrolet Company on an indemnity agreement.

Mr. Garrison: That is exactly the point. We are prepared to meet that. We were prepared to meet it at the [23] pre-trial on the question of law, but they said they had questions of fact. Your Honor said, "If you have questions of fact, we will set it down for trial," and that is why we are here.

On that very point, I have an answer to what Mr. Archer stated about his cross-examination in that former trial. I answer that by the fact that we are now proceeding with that trial, they are per-

fectly entitled to bring in any further evidence that they wish to bring in and produce witnesses for further cross-examination here. There is no restriction on what you can go into in this record, either in impeachment of the witnesses or in connection with any part thereof.

The Court: You are merely asking that the record be considered as part of the case?

Mr. Garrison: It is in here. I don't think your Honor can strike it out if you wanted to, because we are in 23171, and we have the right——

The Court: What is it that you are going to put in as part of your case, inasmuch as the record which is already in includes the documents and the findings and the judgments and the exhibits? Is there anything else that you are going to put in as part of your case in No. 23171?

Mr. Garrison: No, that is our case.

Then I shall move over to the second consolidated matter and introduce the interrogatories and the depositions in [24] evidence.

Mr. Pascoe will tell me there is something else. We do have one matter, and that is the uestion of our attorney's fees in connection with defending the litigation which we contend we are entitled to recover from our indemnitor as part of the indemnity agreement. You have a copy of our answer to your interrogatories which I believe we have filed. I have a witness on call who will establish the facts, but your Honor said at the pre-trial that we should get together and try to thrash this out between ourselves.

Mr. Archer: Mr. Garrison said he would have it for me Monday; I just got it about ten o'clock.

Mr. Garrison: There is an item of $8,000 for attorney's fees.

The Court: What you are trying to say is whether or not you can get a recovery, if you are entitled——

Mr. Garrison: If we are entitled to anything, that would be the amount of the attorney's fees.

Mr. Archer: I won't stipulate to that. We are objecting to the answer in Interrogatory No. 3. I will stipulate that the amounts set forth there were paid.

Mr. Clark: I would like to read that in the record, if the Court please.

Mr. Garrison: The interrogatories will be filed anyway.

Mr. Archer: That isn't evidence. [25]

The Court: The stipulation is all you need.

Mr. Garrison: If you don't stipulate, we will call the witness.

Mr. Archer: The reason I wanted to put it this way is I have certain objections to make to various sums that are set forth here, and I think it would be to any sum after January 2, 1948 on the ground that it was an unreasonable expenditure. Your Honor will remember that notice of appeal was filed in the case and no substitution was made on the part of Defense Supplies Corporation, so in effect there was an abortive appeal, and it is going to be our position that from that point on every-

thing connected with the appeal would be an unreasonable fee.

Mr. Garrison: Mr. Archer, you will not agree that anything is due us or if anything is due us, the items are chargeable to your client at all. All we are talking about is that if a witness were called he would testify that Lawrence Warehouse paid those sums in connection with our work in this case.

The Court: Irrespective of the materiality, reserving his point; is that what you mean?

Mr. Garrison: Certainly.

Mr. Archer: Your Honor, there is one other thing. It doesn't appear what part was paid for the appeal and what part was paid for the trial. I will tell you what I will do. I will hand my copy of the interrogatories to the reporter and ask that he copy them. I will stipulate to the truth of the facts therein under "Attorney's Fees" and down to line 23 on page 26, $1419.25, subject to the objection I have made.

The Court: Does that cover it?

Mr. Garrison: Are you stipulating to part and not another part?

Mr. Archer: No, that is all the figures you have here.

Mr. Garrison: The total amount is eight thousand and something, isn't it?

Mr. Archer: There was a segregation.

(Private conversation between counsel.)

Mr. Garrison: I see. Fine. That is fine.

The Court: That covers the stipulation, counsel, satisfactorily?

Mr. Garrison: That is right; that would be the evidence if the witness were called. The legal effect of it is quite something else again.

The Court: Very well.

Mr. Garrison: As I said, that is all the evidence that we intend to introduce insofar as 23171 is concerned, and I will be very glad to proceed now to tell you why I think we are entitled to do this in 23171.

The Court: Let's save that. Let's get in the record what evidence you wish to present in the other case. [27]

Mr. Garrison: In the other case——

Mr. Archer: I would like to make an objection in 23171, an objection to the admission of any evidence in 23171 or 30473, your Honor, on the ground that on the basis of the judicial knowledge of the Court and on the basis of the pleadings, it affirmatively appears that Lawrence Warehouse Company is not entitled to any relief in either case against any cross-defendant. I wanted to make that point.

Mr. Garrison: I will stipulate that you did make the point or it may be considered made in 23171.

The Court: At this time I will reserve ruling on it.

Mr. Clark: Your Honor has no objection to the form of the objection?

The Court: No.

Mr. Clark: Your attention was not called to the specific items of judicial knowledge.

The Court: No. You put it in any form that you want. I will reserve the ruling.

Mr. Archer: At this time I have written motions; I don't propose to argue them or take any more of the Court's time, in both cases. I would like to file them and serve them here in Court. And for that reason I have a memorandum of points and authorities attached to the motion in 30473.

Mr. Garrison: Why don't you wait until I finish?

Mr. Archer: I wanted to make that—— [28]

The Court: All right; counsel will file his motions and give a copy of them to your opponent. I will reserve ruling on it.

Mr. Archer: I will serve copies on counsel.

Also in 30473 that motion is on behalf of the defendants F. Norman Phelps and Alice Phelps who have not as yet answered in the case. In other words, this is their first answer. But if it is acceptable to counsel, I will also file their answers.

Mr. Garrison: You said you would file them. I assumed you would.

The Court: The record will show that counsel has filed the answer.

Mr. Archer: Well, no, I have filed the answer of the Phelps' in 30473.

The Court: All right.

Mr. Archer: There is an answer to the amendment to the cross-claim and to the cross-claim.

The Court: Also you are filing the motion to dismiss.

Mr. Archer: To dismiss.

The Court: The answers may be filed, and the Court will reserve ruling on the motions. I think you had better mark these filed.

Mr. Archer: I guess the record would show that they have also been served on counsel. [29]

Mr. Garrison: Do you have the original answer to interrogatories of J. A. Kenyon?

The Court: They are on file. They have just been filed.

Mr. Garrison: The original, no, sir.

Mr. Archer: As far as we know, that was the one which was lost in the mail.

Mr. Garrison: Do you have a copy?

Mr. Archer: I have a copy of the answer.

Mr. Garrison: If you will provide me with a copy, I will stipulate that the copy may be filed and considered the same as though an original had been filed.

Mr. Archer: I will see if I have that.

Mr. Garrison: I will get one. That apparently got lost in the mail. It is the answer to our interrogatories.

Mr. Archer: An answer was served. The answer does not have to be filed. Generally we do, but this was lost in the mail. We did serve the answer.

Mr. Garrison: Yes, a copy, but we do not have the original. I am calling on you for the original to file in the Court.

Mr. Archer: There is no rule that requires it.

Mr. Garrison: No, there isn't, but I asked for it.

Mr. Archer: We can get a copy. I do not have an extra copy. [30]

Mr. Clark: You can make an extra copy and get it to him.

Mr. Archer: These were lost in the mail, your Honor.

Mr. Clark: Perhaps there is one here.

Mr. Garrison: I take it the original depositions of——

The Court: Let's get through with one matter at a time.

Mr. Garrison: They are getting that. I can just finish——

The Court: Are you going to file the interrogatories?

Mr. Garrison: All the interrogatories and the original depositions.

The Court: It is stipulated that you can use a copy instead of the original.

Mr. Garrison: The one where the original was lost.

Mr. Clark: If the Court please, we are speaking now about the answers by James A. Kenyon to the interrogatories submitted to him. We don't want general terms used in the record here.

The Court: All right; a copy of those particular answers may be filed in lieu of the original.

Mr. Clark: In lieu of the original.

The Court: Go ahead, counsel. What is the next matter?

Mr. Garrison: The next matter is the original

depositions of F. Norman Phelps and Alice Phelps.

The Court: They are here.

Mr. Archer: I have no objection to their filing —to the [31] filing of the original depositions.

Mr. Garrison: Thank you. He doesn't object to them. May they be filed?

Mr. Archer: Are you offering them?

The Court: They have already been filed. What do you want to do?

Mr. Garrison: I would like to offer those original depositions.

The Court: Are there any rulings that the Court would have to make in connection with these depositions, or are you satisfied that they may be deemed read?

Mr. Archer: Well, I would object as to persons other than F. Norman Phelps and Alice Phelps, no proper foundation,——

The Court: I am sorry; I didn't hear what you said.

Mr. Archer: As to defendants other than F. Norman Phelps and Alice Phelps, no proper foundation has been laid in both cases. You are only offering them in 30473?

Mr. Garrison: Yes.

Mr. Archer: I guess both of these people live here.

The Court: You mean as to whether or not there is any basis upon which the depositions could be taken?

Mr. Archer: No, could be read, on the ground that—of course they are defendants; he could read

them as against them. I do not object to that.

Mr. Garrison: What are you objecting to then?

Mr. Archer: There are other defendants besides Mr. and Mrs. Phelps. Are you offering them only as against Mr. and Mrs. Phelps now?

Mr. Garrison: No, I am offering them for all purposes in the record the same as any other depositions. They are depositions of the defendants.

The Court: Were all of the defendants given notice of the taking?

Mr. Garrison: Taken by notice, some by stipulation of counsel.

Mr. Archer: I have no question as to the proper formalities.

Mr. Garrison: They were present and participated. Those I offer in evidence now.

The Court: That is the only objection to the offer in evidence?

Mr. Archer: That is the only objection I have.

The Court: The depositions may be admitted then.

Mr. Garrison: Did you get the answers to interrogatories?

Mr. Archer: I have what is in form a copy of the answers to the interrogatories by Mr. Kenyon.

Mr. Garrison: We understand——

Mr. Archer: I think it will be subject to correction by either side.

Mr. Garrison: There will be no objection if there are some [33] corrections.

Mr. Archer: Is it being offered as though read? Is that the offer?

The Court: Yes, either side can call attention to any answers that they wish or make any point that they wish.

Mr. Garrison: It is in the record. We can read it and the Court can read it.

Mr. Clark: To be sure that we do not get this record all mixed up, my understanding is that the mere fact that the answers to interrogatories are filed does not mean that the answers are in evidence.

The Court: Not unless they are offered; that is right.

Mr. Garrison: Certainly.

Mr. Clark: Not unless they are offered. Has an offer been made?

Mr. Garrison: Yes, I offer them in evidence, as to——

The Court: Is there any objection?

Mr. Clark: No.

Mr. Archer: No objection. I just wanted to know, because there is a difference between filing and offering in evidence. There is no objection.

The Court: Very well, the answers to interrogatories propounded to Mr. Kenyon are then admitted in evidence.

Mr. Garrison: And F. Norman Phelps—the depositions you have already ruled on. [34]

The Court: I have already ruled on that.

Mr. Garrison: There is an original answer to interrogatories of Lawrence Warehouse Company propounded by cross-defendant Capitol Chevrolet, and

the original I believe has been presented. I would like to offer that in evidence.

Mr. Archer: I object to that.

The Court: Of course you can't offer your own answers to interrogatories in evidence.

Mr. Garrison: We would like to have your Honor have the benefit of them.

The Court: That is only a part of the discovery proceeding.

Mr. Garrison: Fine.

The Court: You can't offer them in evidence.

Mr. Garrison: The offer, as far as we are concerned, is made anyway.

We also have answers to interrogatories propounded to Capitol Chevrolet Company and Capitol Chevrolet Co. I would like to offer those in evidence.

The Court: Those answers are already on file.

Mr. Garrison: They are here, I believe. I believe they are in the file.

Mr. Archer: No objection, your Honor.

Mr. Garrison: We are making good progress now.

The Court: I don't know whether they are or not. Someone [35] will have to check the record.

Mr. Archer: If they are not there, the record can certainly be supplemented.

The Court: Those are the answers of Capitol Chevrolet Company and——

Mr. Garrison: Capitol Chevrolet Co.

The Court: Those answers to interrogatories propounded are admitted in evidence.

Mr. Garrison: Now that is our evidence in the second case.

Mr. Archer: I have one question—I don't know whether it is in evidence or not—and that is, I noticed in the file 30473 there was an admission placed in there on the pre-trial conference about a certificate of dissolution of the original Capitol Chevrolet Company. I don't know whether——

The Court: What are you going to offer?

Mr. Archer: I don't know whether it is in evidence or not.

The Court: Well, you are getting ahead of us again.

Mr. Archer: All right.

The Court: All I am trying to do is to find out whether this counsel has now put in the record what he wants in support of both cases.

Mr. Garrison: The only other thing is I would like that the stipulation respecting the attorney's fees be the stipulation [36] also in 30473, so that we have it in both cases.

Mr. Clark: What is the fee? We don't know what the fees are?

Mr. Garrison: Yes, you just stipulated to the attorney's fees.

Mr. Archer: There was some stipulation——

Mr. Garrison: The same stipulation in both cases?

The Court: The cases have been consolidated, and I think that probably any evidence in one case could be considered in the other anyhow.

Mr. Garrison: I think so, but I want to make certain.

Mr. Clark: That is subject to the same reservation.

Mr. Garrison: That is it.

Mr. Archer: I think counsel has stated that he was offering evidence first in one case, and that is the way I understood it.

The Court: All right. Do you want the stipulation with respect to attorney's fees in the other case; is that agreeable?

Mr. Archer: Agreed.

Mr. Garrison: That is the evidence. Shall we take the noon recess and let me check during the noon hour?

The Court: If you have anything further to offer, you can do it after the noon recess, then the other side can offer its evidence. [37]

Mr. Clark: Before your Honor suspends, I would like to ask a question for information. In one statement your Honor made you referred, in connection with the first case, to the admissibility of the transcript. According to your Honor's ruling, you referred to the transcript of testimony, then you went on to say exhibits, and detailed two or three other things. Mr. Archer's objection should cover all of those things. May it be understood that it does?

The Court: Yes, it will be so understood.

Mr. Clark: It was directed specifically to the transcript, although it was made to cover——

The Court: The transcript and exhibits, all of it.

Mr. Clark: All evidentiary matter.

The Court: We will take a recess until two o'clock.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [38]

Wednesday, March 6, 2 o'clock p.m.

Mr. Clark: Counsel, will you indulge me for just a minute?

Mr. Garrison: Certainly.

Mr. Clark: ——about the stipulation we made this morning.

Mr. Garrison: Yes.

Mr. Clark: A stipulation was made this morning about the amounts paid by the cross-complainant for attorney's fees and costs. The reporter has made a copy of those amounts and the dates and has handed it to me, and I have handed a copy to counsel. I would suggest that this be made a part of the stipulation appropriately, and the Clerk mark it in some appropriate way so the Court will have before it all the figures there.

Mr. Garrison: No objection.

Mr. Clark: As an integral part of the stipulation.

The Court: Mark it as cross-complainant's Exhibit 1 in connection with the stipulation made this morning.

Mr. Clark: And it is admitted, of course, by the defendants in the first case, Defense Supplies Corporation case—well, in both cases—subject to the objection that was made—qualified by the objection that was made, that those were the amounts paid.

The Court: Very well.

The Clerk: Cross-complainant's Exhibit 1 introduced and filed into evidence.

(Thereupon statement of attorney's fees referred to was received in evidence and marked cross-complainant's Exhibit No. 1.)

CROSS-COMPLAINANT'S EXHIBIT No. 1

ATTORNEY'S FEES

Date		Amount	To Whom Paid
January	2, 1948	$3,500.00	Williamson & Wallace
April	20, 1948	750.00	Williamson & Wallace
June	3, 1948	500.00	Williamson & Wallace
September	2, 1948	140.00	Williamson & Wallace
February	9, 1949	35.00	Williamson & Wallace
March	11, 1949	2,500.00	Williamson & Wallace
November	16, 1951	315.00	Wallace, Garrison, Norton & Ray
February	7, 1952	275.00	Worthington, Park & Worthington
	Total	$8,015.00	

COSTS AND EXPENSES

December	15, 1947	$ 770.53	Williamson & Wallace
December	20, 1947	3.44	Williamson & Wallace
February	26, 1948	54.62	Williamson & Wallace
March	12, 1948	32.28	Williamson & Wallace
April	20, 1948	77.87	Williamson & Wallace
May	12, 1948	12.23	Williamson & Wallace
August	9, 1948	4.88	Williamson & Wallace
November	10, 1948	68.90	Pernau Walsh
December	15, 1948	2.19	Williamson & Wallace
March	11, 1949	273.30	Williamson & Wallace
May	4, 1949	85.90	Williamson & Wallace
June	13, 1949	16.20	Williamson & Wallace
October	6, 1950	1.19	Wallace, Garrison, Norton & Ray
March	13, 1951	9.68	Wallace, Garrison, Norton & Ray
April	13, 1951	2.23	Wallace, Garrison, Norton & Ray
June	15, 1951	7.31	Wallace, Garrison, Norton & Ray
August	8, 1951	1.50	Wallace, Garrison, Norton & Ray
		$1,424.25	
August	3, 1949	5.00	(Refund)
		$1,419.25	

Mr. Garrison: Another item of stipulation, and then that is all of the evidence that we desire to offer. Counsel has agreed to stipulate that the judgment that was rendered in favor of the Reconstruction Finance Corporation against the defendants in 23171, Lawrence Warehouse Company, Capitol Chevrolet Company and McGrew, was paid upon December 1, 1951 by the Lawrence Warehouse Company, and that stipulation applies to both cases.

Mr. Clark: So stipulated.

Mr. Archer: So stipulated, your Honor, although I would object to its admission in the first case as irrelevant.

Mr. Garrison: I am incorrect. It should apply only to the second case, because that is the case in which it was rendered.

The Court: Very well.

Mr. Garrison: That is the evidence on behalf of the cross-claimant.

I might say for the record that the amount of that judgment was $58,859.90. [40]

Mr. Archer: Does the cross-complainant rest?

Mr. Garrison: Yes.

Mr. Archer: I should like at this time to ask you about those documents which we talked about over the 'phone this morning between October 1, 1942 and April 15, 1943. You said that all the documents were in your possession. I would like to see those. I should state that we got out three subpoenas in the last two days for officers of the Lawrence Warehouse Company. In one instance, while the Marshal had talked to him over the 'phone before

he went down there, he was absent by the time he got to Lawrence Warehouse.

Mr. Garrison: I didn't hear that. Would you state that again, please?

Mr. Archer: I said in the one instance that the Marshal had talked to Mr. Hanson over the 'phone before he went down to serve him with the subpoena duces tecum, that by the time that he got down there, Mr. Hanson wasn't there. But counsel said he has all the records, so it doesn't make any difference so far as I am concerned, if he will let me look at the records.

Mr. Garrison: Well, let's make certain one thing: Mr. Hanson's being there or not had nothing whatever to do with the conversation with the Marshal. Mr. Hanson is an employee there, available at any time, and he had nothing to do with the records and no knowledge of them, and any inference that he left because of the Marshal's coming is wholly without [41] foundation.

Mr. Archer: Well, I don't intend to make that inference; I just wanted to explain to the Judge why we were asking these documents.

Mr. Garrison: Oh, so I assume it was gratuitous then.

I told Mr. Archer this morning that his belated effort to subpoena correspondence was unnecessary, because we had in our office all the correspondence in this case, and we do have. A great deal of it is wholly immaterial. And if he will tell me what he wants, I will be very glad to produce it. I have the files here, and whatever is material in our opin-

ion to the case, if he can tell me what he wants, we will be very glad to produce it. That statement I made this morning, and he tells me he doesn't know what he wants.

Mr. Archer: No, I stated what I wanted was all the documents between October 1, 1942 and ending April 15, 1943 with respect to the storage and handling of tires by Capitol Chevrolet Company between Lawrence and Capitol Chevrolet Company.

Mr. Garrison: We have some old, old files in the office; there may be some correspondence in there. We would be very glad to make them available to you. Everything that is material was produced at the trial, and I just am at a loss to know what to do. You are welcome to anything that we have if you will tell me what it is. If you want to see our own [42] litigation files and memoranda,——

Mr. Archer: No, I said between Lawrence Warehouse and Capitol Chevrolet Company—or maybe I didn't, but that is what I mean, the documents between those two.

Mr. Garrison: The correspondence between Lawrence and Capitol?

Mr. Archer: Or agreements; any kind of writings or written documents.

Mr. Garrison: I don't know of any. I believe the only documents that exist are the documents that are in evidence in this case. I will be very glad to have a search made to see if there is anything more that might exist, but I don't know of it; I have never seen it.

Mr. Archer: Well, we are particularly interested

in an amendment to the original agreement of October 1, 1942.

Mr. Garrison: Well, now, you are getting down to the point. An amendment to the original agreement?

Mr. Archer: Of October 1, 1942.

Mr. Garrison: That is the contract that is introduced in evidence?

Mr. Archer: No, the reason I say by letters, somebody may have just written a letter, or there may have been a formal agreement; I have no way of knowing.

Mr. Garrison: Do you have a copy of it?

Mr. Archer: No, as I say, I haven't one. [43]

Mr. Garrison: I never heard of it. We would be very glad to look and see if we can find it. We will send Mr. Meadows down right now. Would you go to the office, look in the file, and see if you can find anything that looks like a letter or a contract amending any document relating to the Lawrence Warehouse and Capitol Chevrolet Company, and bring it back immediately, if you can find it.

I might say I called the Lawrence Warehouse this morning and had them check. They say they have nothing over there. Anything that pertains to this is in our office.

I might say that if there is such a thing in existence, I have never seen it, and I don't think it ever came to our attention.

Mr. Archer: Your Honor, I believe that most of the evidence I propose to offer will be self-explanatory as I proceed, but so there will be no

misunderstanding, unless I specifically indicate otherwise, all evidence I offer will be in both actions, both 23171 and 30473. And some of this may be duplication of what has gone in, but I would like to protect the record by offering it.

The first document I have to offer is a copy of the judgment in 23171-G. I offer that as cross-defendant's Exhibit A.

Mr. Garrison: No objection.

The Court: You can put it in evidence, but it is already [44] part of the record.

Mr. Archer: Well, I was referring to 30473.

The Court: All right.

Mr. Archer: Just so that there is no question it is in evidence in both cases. As I say, there may be some duplication. May it be marked?

The Clerk: Cross-defendant's Exhibit A introduced and filed into evidence.

(Thereupon copy of judgment referred to was received in evidence and marked cross-defendant's Exhibit A.)

Mr. Archer: At this time, I should like to read just the third paragraph of that judgment, your Honor.

"Now, therefore, it is ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements incurred in this action amounting to the

sum of $196.55." As cross-defendant's exhibit next in order, I offer the findings of fact and conclusons of law in No. 23171-G.

The Clerk: Cross-defendant's Exhibit B introduced and filed into evidence.

(Thereupon findings of fact and conclusions of law in [45] No. 23171-G referred to were received in evidence and marked cross-defendant's Exhibit B.)

Mr. Archer: At this time, your Honor, I should like to read paragraphs 5 and 6 from that document.

"Paragraph V. On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by the plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torts, and maintained said premises in said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire.

"Paragraph VI. The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

At this time, your Honor, I should like to offer

into [46] evidence the complaint in No. 23171-G, as cross-defendant's Exhibit next in order.

The Clerk: Cross-defendant's Exhibit C introduced and filed into evidence.

(Thereupon complaint in No. 23171-G referred to was received in evidence and marked cross-defendant's Exhibit C.)

Mr. Archer: I should like to read at this time on page 6, and continuing on page 7, paragraphs III and IV of the fourth cause of action in that complaint:

"On or about April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and neglected, failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire. [47]

"IV. The negligence of each and all of the defendants concurred and joined together to destroy plaintiff's goods, as aforesaid."

Your Honor will note that that is almost the pre-

cise wording which your Honor used in the finding of fact and conclusions of law.

Mr. Garrison: I should like to say, your Honor, that my failure to object is not because of any acquiescence in the materiality but just simply to save time.

Mr. Archer: As cross-defendant's Exhibit next in order, I offer the answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants in No. 23171-G.

The Clerk: Cross-defendant's Exhibit D introduced and filed into evidence.

(Thereupon answer referred to above was received in evidence and marked cross-defendant's Exhibit D.)

Mr. Archer: At this time I should like to read beginning at page 8, lines 1 to 4, your Honor, to show as it has been previously been shown, that Defense Supplies Corporation charged Lawrence Warehouse Company as being primarily negligent. I am showing, with the portion I am about to read now, that Lawrence Warehouse Company defended on the ground that if it was negligent it was only secondarily negligent.

Beginning at line 1, page 8:

"And for a further and separate answer and by way [48] of cross-claim against the defendants Clyde W. Henry, Constantine Parella and Capitol Chevrolet Company, this defendant and cross-claimant avers as follows:"

And there following is the entire cross-claim

against Capitol Chevrolet Company in the first action, averred not only as a cross-claim but also by way of answer.

Continuing in the same document, your Honor, on the last page, page 11, I should like to read the verification.

"State of California, City and County of San Francisco.

"Clyde Hildreth, being first duly sworn, deposes and says:

"That he is an officer, to wit, secretary of Lawrence Warehouse Company, a corporation, a defendant in the above-entitled action; that he has read the foregoing answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. Clyde Hildreth.

"Subscribed and sworn to before me this 8th day of May, 1944. [48-A]

"Hazel E. Thompson,

"Notary Public in and for the City and County of San Francisco, State of California."

Notarial seal.

In view of that verification I should like to turn now to page 4, which is paragraph II, paragraph II commencing on page 3, but I would like to invite your Honor's attention to lines 3 to 8, and I shall read them:

"Incident to said storage and the rental of said premises, plaintiff directed that this defendant employ watchman for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff." Turning now to page 7, paragraph II, lines 2 through 8:

"That at all times mentioned in plaintiff's complaint, and at the time of the fire therein referred to, plaintiff maintained a watchman on the premises in which plaintiff's said tires and tubes were stored; that said watchman was under the direction and control of plaintiff and was so maintained to protect plaintiff's tires and tubes from loss or damage by fire and from theft or other loss;"

Turning now to page 9, paragraph III of the cross-claim,— [49] this is on a little different subject, and by way of explanation, I should state that the purpose of it is to show that, by this cross-claim which was filed in 1944, Lawrence Warehouse Company sought indemnity and claimed indemnity from Capitol Chevrolet Company. Beginning paragraph III, line 2:

"That at the time of the said fire, this cross-claimant had stored in the said Ice Palace tires and tubes belonging to the plaintiff Defense Supplies Corporation, which said tires and tubes were in the custody and control of cross-defendant Capitol Chevrolet Company, pursuant to the terms and conditions of an agency agreement between this cross-claimant and said Capitol Chevrolet Company there-

tofore entered into with the approval and consent of the plaintiff Defense Supplies Corporation, and wherein said cross-defendant agreed to store and safeguard the storage of such tires and tubes as were received by it from this cross-claimant or plaintiff Defense Supplies Corporation, and to indemnify this cross-complainant against loss or damage to said tires and tubes."

With that in mind, I now offer in evidence what is not a line for line and page for page copy of the answer of Capitol Chevrolet to the cross-complaint of Lawrence Warehouse [50] Company in No. 23171-G.

The Clerk: Cross-defendant's Exhibit E introduced and filed into evidence.

(Thereupon copy of answer referred to above was received in evidence and marked cross-defendant's Exhibit E.)

Mr. Archer: Turning to page 2, paragraph II, which was the answer to paragraph III which I just read of the cross-complaint, to show a repudiation in 1944 of any liability for indemnity by Capitol Chevrolet Company. Paragraph II, line 19:

"Answering Paragraph III thereof, denies generally and specifically, each and every allegation therein contained; save and except, admits that this answering cross-defendant agreed to and did provide space and storage for certain tires and tubes received by it from the cross-complainant and the Defense Supplies Corporation, and in this connection, it is further alleged that the hazards from

and of fire were known, consented to, accepted and assumed by said cross-complainant and the Defense Supplies Corporation."

I should now like to read, your Honor, Interrogatory No. 2 propounded by cross-defendants Capitol Chevrolet Company, James A. Kenyon, and Capitol Chevrolet Co. to cross-complainant Lawrence Warehouse Company. [51]

"Interrogatory No. 2. State whether or not any attorney, officer, agent or employee of Lawrence Warehouse Company was present in the courtroom of Honorable Louis E. Goodman, United States District Judge, on or about February 13, 1945, at a trial of the aforesaid action of Defense Supplies Corporation versus Lawrence Warehouse Company, et al., when the following testimony was given and the following statements were made:

'The Clerk: Will you state your name to the Court, please?

'A. James A. Kenyon.

'Direct Examination

'By Mr. Miller:

'Q. Will you speak out loud, Mr. Kenyon; you are quite a ways away from us.

'A. I will.

'Q. Are you an officer of the Capitol Chevrolet Company, Mr. Kenyon?

'A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

'Q. You are the owner of the Capitol Chevrolet Company?

'A. Yes.

'Mr. Getz: It was a corporation and was dissolved. [52]

'By Mr. Miller. Q. Were you president of the company?

'A. Yes. We did not dissolve until May 31.'

"If the answer to this question is yes, state the name and relationship of Lawrence Warehouse Company to those who are present on said occasion?"

Reading now from the answer of cross-claimant Lawrence Warehouse Company to the interrogatory propounded by cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.:

"State of California,

"City and County of San Francisco.

"W. R. Wallace, Jr., being first duly sworn, deposes and says:

"That he is one of the attorneys for and a director of cross-claimant Lawrence Warehouse Company, and as such is authorized on its behalf to make this answer to the interrogatories propounded by cross-defendant to cross-complainant."

The answer to No. 2—the Court will remember the question of who was present, and if so, whom.

"Interrogatory No. 2. W. R. Wallace Jr., an attorney for Lawrence Warehouse Company, was present at the time of the testimony quoted in said

answer." [53] I think that should be "in said question."

Mr. Garrison: Sir? I wasn't listening. The answer is that he was present?

Mr. Archer: Yes. He says, "W. R. Wallace, Jr., an attorney for Lawrence Warehouse Company, was present at the time of the testimony quoted in said answer."

I think it should be "said question."

Mr. Garrison: It should be "said question."

Mr. Clark: May we have the Court's indulgence for a brief recess of five or ten minutes. If the Court please, I don't think there will be more than twenty-five or thirty minutes in the remainder of the case.

The Court: We will take a brief recess.

(Recess.)

Mr. Clark: Mr. Kenyon, will you take the stand, please.

JAMES A. KENYON

one of the cross-defendants, called on behalf of the cross-defendants, being first duly sworn, testified as follows:

The Clerk: Q. Please state your full name to the court? A. James A. Kenyon.

Mr. Clark: May I have this document marked for identification, if the court please. [54]

The Clerk: Cross-defendant's Exhibit F marked for identification.

(Certified copies of certificates were marked cross-defendant's Exhibit F for identification only.)

CROSS-DEFENDANT'S EXHIBIT F

Capitol Chevrolet Company
Certificate of Election to Dissolve

We, James A. Kenyon, President, and G. M. Westerfeld, Secretary of Capitol Chevrolet Company, a corporation duly organized and existing under the laws of the State of California, do hereby certify that by consent in writing executed by the holders of 650 shares out of a total of 650 shares outstanding and entitled to vote, representing 100% of the voting power of the corporation, filed with the Secretary of the corporation, the corporation has elected to wind up its affairs and voluntarily dissolve.

In Witness Whereof, we have hereunto set our hands and affixed hereunto the Corporate seal of said corporation, this 1st day of June, 1943.

[Seal] /s/ JAS. W. KENYON, President

Attest:

/s/ G. M. WESTERFELD, Secretary

State of California,
County of Los Angeles—ss.

On this 1st day of June, in the year 1943, before me, Fern E. Worman, a Notary Public in and for said County and State, duly commissioned and sworn, personally appeared James A. Kenyon and G. M. Westerfeld, known to me to be the persons whose names are subscribed to the within instru-

Cross-Defendant's Exhibit F—(Continued)

ment and acknowledged to me that they executed the same as President and Secretary, respectively, of the corporattion named.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] /s/ FERN E. WORMAN,
Notary Public in and for the County of Los Angeles, State of California. My commission expires June 7, 1945.

[Stamped]: Filed in the office of the Secretary of State of the State of California June 21, 1943. Frank M. Jordan, Secretary of State.

[Stamped]: Office of Secretary of State Corporation Number 160624.

Certificate of Winding Up and Dissolution

James A. Kenyon, Gordon A. Kenyon and G. M. Westerfeld hereby certify that they are all of the Directors of Capitol Chevrolet Company, a corporation, and each for himself hereby states that the said corporation has been completely wound up, its known assets distributed and that any and all taxes or penalties due under the Bank and Corporation Franchise Tax Act have been paid, and its other known debts and liabilities adequately provided for, and that the corporation is dissolved.

/s/ JAS. A. KENYON,
/s/ G. M. WESTERFELD,
/s/ G. A. KENYON

Cross-Defendant's Exhibit F—(Continued)

State of California,
County of Los Angeles—ss.

On this 31st day of December, 1943, before me, Fern E. Worman, a Notary Public in and for the County of Los Angeles, State of California, personally appeared James A. Kenyon, Gordon A. Kenyon and G. M. Westerfeld, known to me to be all of the Directors of Capitol Chevrolet Company, and known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal] /s/ FERN E. WORMAN,
Notary Public in and for the County of Los Angeles, State of California. My commission expires June 7, 1945.

[Stamped]: Filed in the office of the Secretary of the State of California June 5, 1944. Frank M. Jordan, Secretary of State.

[Stamped]: Office of Secretary of State Corporation Number 160624.

Mr. Clark: I should like to show it to counsel.

Mr. Garrison: No objection to the use of that.

Mr. Clark: I want to offer it in evidence then.

Mr. Garrison: Yes.

Mr. Clark: I offer in evidence, if the Court please, defendant's Exhibit F now marked for identification. It consists of certified copies of two certificates filed with the Secretary of State of the

(Testimony of James A. Kenyon.)

States of California on behalf of Capitol Chevrolet Company, one a certificate of intention to dissolve, the other a certificate of completion. I should like to read at the moment the second one particularly.

Mr. Garrison: We have no objection to that being introduced in evidence, your Honor.

The Court: All right.

The Clerk: Cross-defendant's Exhibit F admitted into evidence.

(Thereupon cross-defendant's Exhibit F for identification only was received in evidence.)

Mr. Clark: I am reading now from the Certificate of Winding Up and Dissolution. I don't want to read the form certificate, because your Honor is familiar with that. I do [55] wish to read the verification for the purpose of indicating in the record specifically the date, or some dates.

"State of California, County of Los Angeles, ss.

"On this 31st day of December, 1943, before me, Fern E. Worman, a Notary Public in and for the County of Los Angeles, State of California, personally appeared James A. Kenyon, Gordon A. Kenyon and G. M. Westerfeld, known to me to be all the directors of Capitol Chevrolet Company, and known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

"Witness my hand and official seal."

Formally executed.

That was filed in the office of the Secretary of State of California on June 5, 1944.

(Testimony of James A. Kenyon.)

I would like to ask counsel if he will stipulate with me that the complaint of the Defense Supplies Corporation against Capitol Chevrolet Company, Lawrence Warehouse Company and others was filed on February 16, 1944, the purpose of the stipulation being for the second case, not the Defense Supplies Corporation case at all. Your Honor can take judicial notice of that, of course.

Mr. Garrison: That is the fact.

Mr. Clark: Well, subject to correction. [56]

Mr. Garrison: No, that is the fact. The complaint itself shows it was filed on that date. Yes, I will stipulate.

Mr. Clark: And you stipulate. Very well; thank you.

Direct Examination

Mr. Clark: Q. Where do you reside, Mr. Kenyon? A. Palm Springs, California.

Q. And how long have you resided there?

A. Five or six years.

Q. You were the president of Capitol Chevrolet Company before it was dissolved and liquidated, were you not? A. Yes, sir.

Mr. Clark: I am going to ask some leading questions because I think they are harmless, just to lay a little background.

Q. And you know about the contract that Capitol Chevrolet Company made with Lawrence Warehouse Company for the storage of some tires?

A. Yes, sir.

Q. You also know that a fire occurred in the

(Testimony of James A. Kenyon.)

warehouse in which some of the tires, at least, were stored? A. Yes, sir.

Q. And you testified in the case brought by the Defense Supplies Corporation against Capitol Chevrolet Company and others? A. Yes, sir. [57]

Q. Where were the tires stored? Where did the fire take place? At what warehouse?

A. At the Ice Palace in Sacramento.

Q. Inside the city limits of Sacramento?

A. No, in Yolo County.

Q. Prior to the time that tires were stored in the Ice Palace had any tires been stored by you elsewhere for Lawrence Warehouse Company?

A. Yes, sir.

Q. When I say you, I mean the Capitol Chevrolet Company. A. Yes, sir.

Q. Where?

A. In eleven warehouses in Sacramento.

Q. Within the city limits?

A. Within the city limits.

Q. Was the storage of tires at the Ice Palace an additional storage place or in lieu of other storage?

A. It was a consolidation of the tires.

Q. What do you mean by a consolidation?

A. The tires that were in the eleven warehouses were being consolidated and put in the Ice Palace.

Q. In one warehouse? A. Exactly.

Q. Instead of in eleven? A. Exactly. [58]

Q. Do you know why that was done?

(Testimony of James A. Kenyon.)

A. Well——

Q. I am not asking for surmise or anything of that kind; I am asking you for facts. If you don't know, why, say so. A. Actually, no.

Q. Did you have any conversation with any officer or representative of the Lawrence Warehouse Company prior to the consolidation of the storage in the Ice Palace about the consolidation of the storage in the eleven warehouses? A. Yes.

Q. While the tires were stored in the eleven warehouses did the Capitol Chevrolet Company wish to consolidate the storage. A. No, sir.

Mr. Garrison: Object to it on the ground that it calls—I beg your pardon; excuse me. I withdraw the objection.

Mr. Clark: Q. Your answer was what?

A. No, sir.

Q. How did it come about that the storage of the tires was consolidated in the Ice Palace?

Mr. Garrison: Pardon me; that is objected to on the ground that unless it has a foundation laid it will call for hearsay testimony and his opinion and conclusion.

Mr. Clark: We are going to give the conversation in a moment, if the court please, or the substance of it. The question is a little bit improper in form. [59]

The Court: You have asked him for his conclusion as to why——

Mr. Clark: Yes, I did, and I will withdraw that question and start another way.

(Testimony of James A. Kenyon.)

Q. Did you have one or more conversations with anybody representing the Lawrence Warehouse Company about consolidating storage of the tires?

A. Yes, sir.

Q. With whom was that conversation?

A. Bill Hanley.

Q. Who was Bill Hanley?

A. He was the vice-president of Lawrence Warehouse.

Q. Did you have more than one conversation with him about that subject? A. Yes.

Q. Can you distinguish one conversation from the others? A. No.

Q. Tell us what was said in those conversations?

Mr. Garrison: Pardon me; objected to on the ground that no proper foundation laid as to time, place, and persons present.

Mr. Clark: All right, that is correct; I will lay the foundation.

Q. With respect to the time when the tires were stored in the eleven warehouses and the time when the Ice Palace was [60] decided upon by somebody for the consolidation of the storage, when did the conversation or conversations take place?

A. You mean the date?

Q. No. If you can give the date, yes, give it to us approximately.

A. I can't give the date, but it was prior to the leasing of the Ice Palace.

Q. And was it before or after the tires were stored in the eleven warehouses?

(Testimony of James A. Kenyon.)

A. It was after the tires were stored.

Q. All right. And where did the conversations take place?

A. In my office in Capitol Chevrolet in Sacramento.

Q. Anybody else present at any of them?

A. Yes, my brother.

Q. What is his name?

A. Gordon A. Kenyon.

Q. Anybody else?

A. And a man by the name of Baxter from the Defense Supplies Corporation; I don't know his first name.

Q. All right. Were your brother and Baxter present at all the conversations you had with Mr. Hanley? A. Yes, sir.

Q. Go ahead and state as nearly as you can in the language that was used what the conversations were that you had with Mr. Hanley about consolidating the storage? [61]

A. The reason that Lawrence Warehouse Company wanted the tires——

Mr. Garrison: Now, if your Honor please——

The Court: No; just say what the man from Lawrence Warehouse Company said to you.

A. Pardon.

The Court: Rather than what the reason was.

Mr. Clark: I think I can shorten this a little by asking——

The Court: The fellow from the Lawrence Ware-

(Testimony of James A. Kenyon.)

house Company gave you some reason why he wanted them stored in one place?

A. Exactly.

Q. What did he say?

A. The United States Government wanted watchmen twenty-four hours a day on the tires, and we had the tires in eleven warehouses, which would take thirty-six watchmen. By consolidating the tires we could use three watchmen instead of thirty-six.

Mr. Clark: Q. Who could use——

The Court: That was what Mr.——

A. Hanley—Bill Hanley, yes.

Q. That is what he said to you?

A. Exactly.

Mr. Clark: Q. You say "We could use three watchmen [62] instead of thirty-six." Was Capitol Chevrolet Company using any watchmen at all while the tires were stored in the eleven warehouses?

A. No, sir.

Q. Did Capitol Chevrolet Company employ or pay any watchmen after the tires were stored in the Ice Palace? A. No, sir.

Q. Do you remember any of the language used by Mr. Hanley when any of the conversations occurred about consolidating the storage in the Ice Palace? I am trying to find out this, frankly: It is rather a blind question—whether you wanted to store them there or somebody else wanted them stored in the Ice Palace. And when I say you, I mean the Capitol Chevrolet Company.

(Testimony of James A. Kenyon.)

A. The Lawrence Warehouse Company wanted——

Mr. Garrison: I move that be stricken out as a concluson.

The Court: Yes.

Mr. Clark: Q. Well, what did Mr. Hanley say?

The Court: I think he has already answered your question, Mr. Clark.

Mr. Clark: I think he has, really.

The Court: He has already told you what the man said.

Mr. Clark: I think he has really.

Mr. Garrison: Does the answer go out? [63]

The Court: Yes, the answer may go out.

Mr. Clark: Q. Was any inspection made of the Ice Palace by the Lawrence——

The Court: Q. As a matter of fact, it strikes me from your answer that what really happened was that the Government wanted them stored in that warehouse; if they were going to pay for the cost of the watchmen it would be to their interest rather than either your interest or the Lawrence Warehouse Company's, isn't that about right?

A. That would be an assumption and that is what I assumed.

Q. As between you and the warehouse company, it didn't make any difference one way or the other, because you weren't going to have to pay for the watchmen anyhow?

A. Well, insofar as Capitol Chevrolet Company; I don't know whether Lawrence——

(Testimony of James A. Kenyon.)

Q. If you had to pay for the watchmen, then of course it would be advisable to have them in one place. Inasmuch as the Government was going to have to pay for the watchmen I suppose the answer was that it was more to the Government's interest?

A. I don't know whether the Government was paying for it or Lawrence Warehouse was; all I know is that we didn't pay for it.

The Court: All right.

Mr. Garrison: There is no dispute, counsel, is there, [64] that the Government did pay for the watchmen?

Mr. Clark: I don't know what the facts are about that.

Mr. Garrison: I think that is the fact.

The Court: I think that appeared in the record.

Mr. Clark: I believe it is so stated in one of these answers that was read here today.

The Court: Excuse me; go ahead.

Mr. Clark: Yes.

Q. Was any inspection made of the Ice Palace as a prospective warehouse for the consolidated storage of tires by Capitol Chevrolet Company or Lawrence Warehouse Company or any representative of theirs before the storage actually began?

A. Yes, sir.

Q. Who made the inspection?

A. Myself, my brother, Baxter and Hanley.

Q. Did you have any conversations with Mr. Hanley during the time of the inspection?

A. Yes, sir.

(Testimony of James A. Kenyon.)

Q. State the substance of those conversations, please.

Mr. Garrison: Counsel, the time and place.

Mr. Clark: Well, this occurred——

Q. Will you tell us when it occurred?

A. Prior to the signing of the lease or prior to storing any tires.

Q. About the time or prior to signing of the lease on the [65] Ice Palace.

Mr. Garrison: Where?

Mr. Clark: Q. Where?

A. At the Ice Palace and in my office.

Q. In your office. Was anybody present except you, your brother, Mr. Hanley and Mr. Baxter?

A. No.

Q. All right. Now tell us the substance of the conversations.

A. The Ice Palace is outside the city——

Mr. Garrison: I move that that be stricken as not responsive.

Mr. Clark: You have already testified to that.

The Court: I know where it is. Just state the conversation.

Mr. Clark: Q. Go ahead.

A. We agreed that there was no question but what——

Mr. Garrison: Just a minute. If the Court please, I move to strike out what they agreed as not part of the conversation.

The Court: Don't get impatient, Mr. Kenyon.

The Witness: I am not impatient.

(Testimony of James A. Kenyon.)

The Court: You know the witnesses always want to——

The Witness: Tell a story.

The Court: (Continuing): ——make a statement and tell us a story. All the lawyer wants you to do is to just state what was said in the conversation. [66]

Mr. Clark: Just state the substance of what was said if you can't remember exactly what was said.

A. There was a fire hazard in the Ice Palace.

Q. Who said there was?

Mr. Garrison: I move to strike that out as not part of the conversation.

Mr. Clark: Q. Wait a minute. Who said there was a fire hazard there if anybody of the group?

A. That I couldn't say, but it was discussed.

Q. Among the group?

A. Among the group, and as we examined——

Mr. Garrison: Your Honor——

Mr. Clark: Go ahead.

The Witness: I don't know how to explain it.

Mr. Clark: Go ahead; that isn't objectionable.

The Court: You proceed; we will see what the answer is.

A. As we examined the Ice Palace, there was a two inch rubber hose to protect the Ice Palace against fire.

Mr. Garrison: If the Court please, I move that be stricken out as not part of the conversation.

Mr. Clark: Q. Did you have some conversation about that hose?

A. We did have conversation.

(Testimony of James A. Kenyon.)

The Court: State what was said. [67]

A. That is what I am trying to bring out.

Mr. Clark: It will be a part of the conversation.

The Witness: And the hose was rotten and full of holes.

Mr. Garrison: If the court please, I move that be stricken out as not part of the conversation, a statement of fact by Mr. Kenyon.

The Witness: It was part of the conversation.

The Court: That statement of the witness would have to go out. You may state what you said about it, or what anyone present said about the hose.

Mr. Clark: Well, put it this way, Mr. Kenyon,—these things are sometimes difficult—what was done and said by any of the four of you at the time that you mentioned in the presence and hearing of the others? Go ahead and state it.

A. We called from my office after inspecting the Ice Palace, the four involved——

Q. Yes.

A. ——called the chief of the Defense Supplies Corporation in San Francisco and told him that it would be necessary——

The Court: Q. Was that in your presence?

A. The four of us together in my office—and told him that it would be necessary to get a priority——

Mr. Garrison: If your Honor please, I think we ought to know who did the calling and who did the talking.

The Court: Yes. [68]

(Testimony of James A. Kenyon.)

The Witness: Mr. Baxter.

Mr. Garrison: And what did he say?

Mr. Clark: Now if you will just wait, we will get this conversation out in time.

Q. Go ahead, Mr. Kenyon.

A. That it would be necessary for the Government to give us a priority to get new hose for the Ice Palace, because there was a fire hazard and the hose was rotten and full of holes.

Q. Is that all that occurred at that time?

A. After that conversation——

Q. Go ahead.

A. We—the four of us agreed that it was all right to sign the lease.

Mr. Garrison: Now, if the Court please, what they agreed is a conclusion.

Mr. Clark: Q. Did each of you say to the other, or didn't you, that you would sign the lease?

A. We did.

Q. Did you say anything else to each other?

A. First, this is nine years ago——

Q. Yes.

A. Second, we wouldn't say, "We will sign the lease," without saying further that "We will now transfer the tires from the eleven warehouses to the one warehouse." [69]

Q. That is right; yes. Now your contract that you made—that Capitol Chevrolet Company made with Lawrence Warehouse Company, provided for payment for storage of a certain number of cents for tires and a certain number of cents for tubes.

(Testimony of James A. Kenyon.)

Did you receive any additional compensation from Lawrence Warehouse Company incident to the consolidated storage? A. Yes, sir.

Q. Explain that, please.

A. We were receiving three cents a tire from the Lawrence Warehouse for receiving and storing the tires. When it came to the consolidation I made an agreement with the Lawrence Warehouse to receive seven cents a tire to transfer them from the eleven warehouses into the Ice Palace.

Q. Were you paid seven cents?

A. Yes, sir.

Q. For the transfer? A. Yes, sir.

Q. At the rate of seven cents for the transfer of the tires? A. Yes, sir.

Q. Was that agreement in writing, or do you remember? A. That I don't know.

Mr. Clark: That, incidentally, is what I wanted to find out by that subpoena duces tecum, whether or not that seven cents agreement was in writing.

Mr. Garrison: Oh, I see. [70]

The Court: He has testified that he got paid anyway.

Mr. Clark: It was an executed oral agreement anyway at the worst.

I think that is all.

The Court: Any questions, counsel?

Mr. Garrison: I have no questions on cross.

I do have questions of this witness, however, in respect to issues in the second case. I would prefer to reserve that examination until we finish.

(Testimony of James A. Kenyon.)

The Court: You mean by way of rebuttal?

Mr. Garrison: No, it is evidence in connection with those issues. It isn't proper cross-examination at this moment. I will put Mr. Kenyon on——

The Court: I thought you had rested.

Mr. Garrison: I have, but I didn't know Mr. Kenyon was here. As a matter of fact, I have been looking for him a long time.

Now I would like to call him under 2055 at a later time, and if he is going to be in the court-room, I will address myself to your Honor in that connection. If he is going to be here it would be more in order if I put him on later rather than now.

Mr. Clark: Mr. Kenyon told me last night that he was going to get his reservations to go away to-night; I don't know whether he has got them. [71]

The Court: Whatever he wants to ask him, he will have to ask him today.

Mr. Garrison: Yes, I will ask him today.

The Court: You may step down.

Mr. Clark: No cross-examination?

Mr. Garrison: No cross at this time.

Mr. Clark: That is the case for the defendants.

The Court: Do you wish to re-open your case?

Mr. Garrison: Now may I have the privilege of re-opening?

The Court: What do you want to do?

Mr. Garrison: I want to ask Mr. Kenyon some questions regarding the dissolution first of the Capitol Chevrolet Company, the transfer of its assets

to the stockholders, the assumption of the liabilities by those stockholders of those assets.

Mr. Clark: Haven't you got those answers already? Those are in the answers to the interrogatories.

Mr. Garrison: No, they are not quite satisfactorily. The formation of a partnership; the subsequent transfer of those assets to a new corporation——

The Court: That wouldn't take very long.

Mr. Garrison: No, it won't. And the ultimate transfer out of himself of all interest in the Capitol.

The Court: In order that everybody's record may be complete [72] before we get to arguing this matter, put Mr. Kenyon on now.

Mr. Archer: But let us note an objection on behalf of the cross-defendants in both cases to any further testimony. It is certainly improper rebuttal.

The Court: There is no question about that, it is improper rebuttal.

Mr. Clark: I am afraid it is in the discretion of the court to permit it.

The Court: The court will certainly permit additional evidence. Apparently this is on another subject matter.

JAMES A. KENYON

recalled as an adverse witness by the cross-claimant, and having been previously duly sworn, testified as follows:

Mr. Garrison: Q. Mr. Kenyon, you say your residence is in Palm Springs?

(Testimony of James A. Kenyon.)

A. That is right.

Q. Have you spent any substantial time there in the year 1951?

Mr. Clark: That is immaterial, if the Court please, if that is his residence, it doesn't make any difference how long he spends there.

Mr. Garrison: Very well.

Q. You do also have a residence in Acupulco, Mexico, do you [73] not? A. No, sir.

Q. You have been there just recently, have you not? A. Yes, sir.

Q. Going back to the formation of Capitol Chevrolet Company, were you one of the incorporators of that corporation? A. Yes, sir.

Q. And it was formed on October 1, 1942, was it not? Well, not the exact date, but approximately that time.

A. It was formed in May, 1936. Now whether it was changed in '42, I couldn't tell you the dates without looking in the records.

Q. You were the owner of one-half of the stock of that corporation from the beginning?

A. No, sir.

Q. Some time prior to 1942 you did acquire one-half of it, did you not? A. Yes, sir.

Q. And the other half of the stock was owned by the Adams Service Company at that time?

A. At that time, yes, sir.

Q. And those two interests continued the ownership until that corporation was dissolved on May 31, 1942?

(Testimony of James A. Kenyon.)

A. That isn't quite true. I owned thirty per cent of the company; and James A. Kenyon, trustee for my daughter, owned [74] twenty per cent of the company, and the Adams Service Company owned fifty per cent of the company.

Q. That is in the first Capitol Chevrolet Company? A. No, that is in the second one.

Q. I am only talking about the Capitol Chevro- Company before 1942. A. All right.

Q. Before May 31, 1942.

A. The General Motors Holding Corporation owned $80,000 out of $85,000; I owned $5,000.

Q. Do you recall your answers to the interrogatories, Mr. Kenyon, filed in this action and as part of this record? And I will ask you if you were asked these questions and gave these answers:

The answers do not carry the question with them, so I have to refer to both documents:

"Q. Were you a stockholder of Capitol Chevrolet Company at any time between October 1st, '42 and June 5, '44? If so, how many shares of stock of said corporation did you own and on what date?"

The Court: You are talking about a different corporation now.

Mr. Garrison: No, I am talking about the Capitol Chevrolet Company.

The Court: Yes, but the question you just asked him [75] referred to his ownership of stock at the time that the company was dissolved on May 31st.

Mr. Garrison: Yes, but that goes back prior to

(Testimony of James A. Kenyon.)

that, that was 1942. This is the first company, the only one I have had any reference to—Capitol Chevrolet Company as distinguished from Capitol Chevrolet Co. The Capitol Chevrolet Co. was not incorporated until some time later.

The Court: Do you understand that?

The Witness: May I explain this to you?

Mr. Garrison: No; I will ask the questions. I am referring only to Capitol Chevrolet Company, which I understood was incorporated some time prior to October 1st, 1942. A. Correct.

Q. And was dissolved May 31st, 1942?

A. Correct.

Q. Is that correct? A. Correct.

Q. Now the question in the interrogatory——

The Court: That is not clear to me. You say it was organized prior to 1942 and dissolved in '42.

Mr. Clark: '43 it was dissolved.

Mr. Garrison: My typographical error; it was '43.

The Court: All right.

Mr. Garrison: Q. The question was:

"Were you a stockholder of Capitol Chevrolet Company [76] at any time between October 1st, 1942 and June 5, 1944? If so, how many shares of said corporation did you own and on what dates?

"A. I was a stockholder of Capitol Chevrolet Company at all times between October 1st, 1942 and June 5th, 1944. During this period I owned 325 shares of the 650 shares outstanding."

Is that correct?

A. That is correct.

(Testimony of James A. Kenyon.)

Q. That refreshes your memory about it?

A. Maybe I misunderstood your question. You said prior to 1942.

Q. Well, I am now talking between '42 and the time of the dissolution. A. That is correct.

Q. The other half of the corporation was owned by Adams Service Company?

A. That is correct.

Q. During that period. Now is it a fact that the Capitol Chevrolet Company was dissolved May 31, 1943? Is that correct?

A. That would be in the record.

Q. I beg your pardon?

(The Reporter read the question.)

Mr. Clark: The certificate shows that.

Mr. Garrison: If you don't recall, I can check the record [77] on it. Do you recall——

A. It is—as far as I know, I don't remember the date, but it is in the record.

Mr. Garrison: All right.

The Court: The certificate is dated June 1st.

Mr. Garrison: The date it was filed. I think it is May 31st——

Mr. Archer: On the certificate of dissolution——

The Court: The certificate of election to dissolve is dated June 1, 1943 and it was not filed until June 21, 1943 in the office of the Secretary of State.

Mr. Garrison: The exact date isn't important to my questions anyway.

Q. At any rate, between May and June, '43 it was dissolved? A. Correct.

(Testimony of James A. Kenyon.)

Q. And did you, as one of the stockholders, assume the liabilities of Capitol Chevrolet Company on its dissolution? A. Yes, sir.

Q. And did you receive the assets of the corporation? A. My share.

Q. You received one-half? Now, in what manner did you, as one of the shareholders, assume the liabilities? Were documents executed or were bonds posted or money deposited? A. No, sir.

Q. What was done? [78]

A. Morally we assumed it.

Q. I beg your pardon?

A. Morally we assumed the obligations.

Q. Did you do any act in connection with that?

A. No, sir.

Q. What happened happened, is that right?

A. That is what we did.

Mr. Garrison: Let the record show I am shrugging my shoulders and the witness shrugs his in return.

The Court: I don't know whether that has any particular meaning or not. It may show it.

Mr. Garrison: Well, it might.

Q. Now, Mr. Kenyon, what was done with respect to the business of the Capitol Chevrolet Company upon the dissolution of the corporation? What happened to it? What happened to the assets?

A. They stayed in the company. They stayed in the new company.

Q. What was the new company?

A. Capitol Chevrolet Company.

(Testimony of James A. Kenyon.)

Q. Was that a corporation or a partnership?

A. Partnership.

Q. In other words, did you form then a partnership? A. We did.

Q. And who were the partners? [79]

A. James A. Kenyon, James A. Kenyon Trust, trustee, and Adams Service Company.

Q. Did that partnership receive the assets of the former corporation? A. Yes, sir.

Q. And did the Adams Service Company also assume the liabilities of the Capitol Chevrolet Company? A. Yes, sir.

Q. And how did they assume those liabilities? By any act on their part? A. No, sir.

Q. Did the business continue to operate as it had before, under the partnership? A. Yes, sir.

Q. And how long did that partnership function?

A. Until April, 1946.

Q. And then what happened?

A. Then we formed a corporation.

Q. What was the name of that corporation?

A. Capitol Chevrolet.

Q. That is the Adams Chevrolet Co.?

A. Pardon?

Q. Co.—Adams Chevrolet Co.?

A. Capitol Chevrolet Co.

Q. I mean Capitol Chevrolet Co. [80]

A. Yes, sir.

Q. Who were the stockholders in that corporation?

(Testimony of James A. Kenyon.)

A. James A. Kenyon, James A. Kenyon Trustee, Adams Service Company.

Q. Were the interests the same, fifty-fifty?

A. Yes, sir.

Q. Now after that did your ownership of the Capitol Chevrolet Co. change, or that of your trust?

A. Yes, sir.

Q. What change occurred?

A. I sold it all.

Q. You sold it all? A. Yes.

Q. Did you sell the stock held in the trust?

A. Yes, sir.

Q. Was there also a J. A. K. Company?

A. Yes, sir.

Q. What was that?

A. That was a holding company in Nevada.

Q. Who owned the stock of that company?

A. I did.

Q. Did it own some stock in the Capitol Chevrolet Co. A. It owned all my stock, yes.

Q. And did you sell all of that stock out of that corporation? [81] A. Yes, sir.

Q. And all of the stock held in the trust?

A. Yes, sir.

Q. And to whom did you sell it?

Mr. Clark: That is immaterial, isn't it?

Mr. Garrison: I don't think so.

Mr. Clark: I don't think it makes any difference. He says he sold it.

Mr. Garrison: I know, but let's find out who acquired it. I think it might be interesting.

(Testimony of James A. Kenyon.)

Q. Who acquired your interest?

A. I think that the Capitol Chevrolet Company acquired it.

Q. In other words, it was purchased by the corporation? A. I think so.

Q. As I understand it, then, at the time you assumed the liabilities of the first Capitol Chevrolet Company there was no deposit of money made any place for the payment of those liabilities?

A. No, sir.

Q. No bond posted to secure their payment?

A. No, sir.

Q. And the ultimate fact is that you transferred out of your name and out of the name of your trust all of the stock of that corporation?

The Court: I think probably what you did was you must [82] have made some entries in the minutes of the corporation.

The Witness: It could be.

The Court: That you would provide for the liabilities, because I notice——

Mr. Archer: That is correct, your Honor.

The Court: Because I notice the certificate which you signed, if you will look at it says that.

The Witness: Of course we agreed to assume the liabilities.

Mr. Archer: That is in the answers to the interrogatories.

The Court: Oh, it is?

Mr. Garrison: Q. Now do you know Mr. and Mrs. Phelps? A. Yes, sir.

(Testimony of James A. Kenyon.)

Q. Are they the principals in the Adams Service Company?

Mr. Clark: Just a moment. I object to that on the ground——

Mr. Garrison: He says he doesn't know.

Mr. Clark: ——the term "principals" make it ambiguous. What is a principal?

The Court: He says he doesn't know anyway.

Mr. Garrison: He says he doesn't know.

Q. Does the J. A. K., your holding corporation, still exist? A. No, sir.

Q. Does the trust by your daughter still exist?

A. Yes, sir. [83]

Q. Was there any change in the assets of the corporation, the Capitol Chevrolet Company, as it was transferred from that corporation to the partnership? A. No, sir.

Q. In other words, the physical aspects of the corporation remained the same?

A. Yes, sir.

The Court: Q. The partnership carried on the business? A. Exactly.

Q. And then again the business was transferred again to the second corporation and it carried on in the same way? A. Yes, sir.

Q. It sounds to me like you had a tax lawyer, did you not? A. Yes, sir.

Mr. Clark: Correct.

Mr. Garrison: Q. And since July of 1950 you have had no interest in the Capitol Chevrolet Co.?

(Testimony of James A. Kenyon.)

A. No, sir.

Q. Do you know of any fund or place where the liabilities of the Capitol Chevrolet Company can be satisfied?

Mr. Clark: That is immaterial and irrelevant. Wait until he gets judgment, which he may get, and levies execution.

The Court: I suppose it might be subject to a lawsuit.

Mr. Garrison: He assumed them personally. I am wondering [84] if, having assumed them, as the Code says, in good faith, and having provided for their payment——

The Court: Maybe he would be responsible for the payment of them.

Mr. Archer: That calls for his conclusion, if you are asking him. One of the questions——

The Court: I think you probably are trying to find out whether he is financially responsible to pay it. Is that what you mean?

Mr. Garrison: No; the corporation provides that on dissolution the shareholders must in good faith make provision for the payment of the liabilities of the dissolved corporation.

The Court: Of course the obligation of the stockholder himself might be sufficient in that regard if he is financially responsible.

Mr. Garrison: Well, yes, but unless they have some place where they can go—I assume to make provision in good faith means there must be some place where those liabilities can be satisfied.

(Testimony of James A. Kenyon.)

The Court: Or an agreement of a responsible person to pay them.

Mr. Garrison: Yes. And here is a man who has dispossessed himself of the stock of the corporation.

The Court: He may still have the responsibility to pay [85] them.

Mr. Garrison: He says he made no provision.

The Court: I don't think you can convert this proceeding into an order of examination in that regard, as if there were a judgment.

Mr. Garrison: No, I can't, but I can test on whether or not he made provision in good faith for the payment of the liabilities. He says he didn't do anything about it and the Code says he must.

The Court: I don't think he said that.

Mr. Garrison: He said he assumed them morally, yes.

The Court: I think he said he did assume them.

Mr. Garrison: But he made no provision for them, and the Code says that he must in good faith make provision for their payment.

The Court: It says the corporation must do that.

Mr. Garrison: No, the shareholder, who receives the assets, must in good faith make provision for the payment of their liabilities.

Mr. Archer: He did that.

Mr. Garrison: I am trying to find out if there is any place——

The Court: What you want to find out is if at that time the witness set aside any funds or property?

(Testimony of James A. Kenyon.)

Mr. Garrison: Yes; he says he didn't. [86]

Q. I take it you did not.

A. We did not.

Q. And then the only question I can ask him is, what provision did you make in good faith for the payment of those obligations, if any there were?

A. We didn't make any.

Mr. Clark: You assumed them, didn't you?

A. We assumed the responsibility and if I owe anybody——

Mr. Archer: He had all the assets.

The Court: Q. You consider yourself bound to pay any debts the corporation did not pay; is that right? A. I do, sir.

Mr. Garrison: But the assets that he received were then in turn transferred to another corporation. But that is a matter of argument.

The Court: I think that is a matter we are not confronted with now, counsel.

Mr. Clark: No.

Mr. Garrison: That is all.

The Court: You have no questions?

Mr. Clark: No.

The Court: That is all.

Does that conclude the record so far as you wish to make it?

Mr. Garrison: I would like to ask Mr. Meadows what he [87] did when he went to the office, what he found with respect to the documents that you requested.

Mr. Clark: The case is over now; it doesn't make any difference.

Mr. Garrison: You are not interested? He didn't find anything anyway.

The Court: Mr. Kenyon has said that he got seven cents. That seems to be the matter Mr. Clark was interested in. It has come in already.

Now you have completed your record so far as evidence is concerned on both sides?

Mr. Garrison: Yes.

Mr. Clark: Yes.

The Court: You wish to argue it now?

Mr. Archer: Yes, we are prepared to argue it.

The Court: Well, suppose you each make an argument as to your contentions, and then if you wish to submit further written argument, you may.

Mr. Garrison: I think, your Honor, that the points are of sufficient importance and interest that I think your Honor will want us to brief them, and we will be very happy to do so. I think it would be helpful if we did make some comments.

The Court: It would be very helpful to me if before you file any written memorandum in the matter, if that is what you [88] wish to do, to just make some short statement as to the points at issue.

Mr. Clark: I think Mr. Archer is prepared to do that now.

Mr. Garrison: Shall I?

The Court: Suppose you lead off on that.

Mr. Garrison: All right. Thank you.

It is our position, your Honor, that the evidence in the case clearly establishes that there was no

negligence on the part of Lawrence Warehouse Company; that the fire was caused by the acetylene torch by a man being permitted to go in there without supervision and without protection — an act which we had no connection with and didn't even know about. I think that that will probably be admitted, because never in the first trial or since has it ever been contended that Lawrence Warehouse was negligent.

The fact of the thing was that when that case was finished, the findings were prepared by the Government for your Honor's consideration, and of course they stated them in language which would be sure to hold in Lawrence Warehouse. And the Lawrence Warehouse should have been held in if there was negligence on the part of Capitol, because the duty that Lawrence Warehouse owed to the Government was non-delegable; it owed that duty if any of its agents were negligent, because under the Warehousemen's Law of California it couldn't [89] divest itself of responsibility. So those findings were made, and I can assure your Honor that they in no way at all will embarrass us in the ultimate disposition of this case, either, first, because they are not against either disposition your Honor might want to make of it, and secondly, because they are entirely consistent with any conclusion your Honor reaches.

I take it that the serious point that is raised here, as set out in the pleadings, is the fact that because the findings say that Lawrence Warehouse and Capitol were negligent and that negligence joined

and concurred, creates a situation, first, that they were joint tort feasors and that there can be no contribution, and, secondly, that the findings are supreme and cannot be even considered in any other light than that they were joint tort feasors.

We are dealing then with a problem, as I see it, where there is no negligence on the part of the principal; and we have to assume that if there is no negligence on the part of the principal and the agent is negligent, the principal is entitled to indemnity either, first, on an applied agreement to indemnify which exists in every principal and agency relationship, and in this case upon the express hold harmless indemnification agreement which I referred to this morning.

So we must ask ourselves then, in the light of this objection, do these findings tie your Honor's hands in passing upon this cross-complaint in this first action and [90] prevent your Honor, even though you do not feel that Lawrence was negligent, from deciding that Lawrence is entitled to a judgment against Capitol on its indemnity agreement? We say that the answer is clearly, "No."

In the first place the only thing that can be considered in a plea of res judicata which they make here is the judgment itself. The Code of Civil Procedure, Section 1911 provides that the judgment is the thing that must be looked at in order to test of whether or not the same issues have been decided between the same parties and therefore cannot be relitigated.

The judgment in this case says simply that Law-

rence Warehouse and Capitol are liable to the Government for X dollars. It doesn't say whether it is on the basis of joint negligence or on the basis of the doctrine of respondeat superior or what. So our first point is that the plea of res judicata must be decided upon that, on that judgment, not upon the findings. That is Section 1911, and the case approving that section is Purcell vs. Victor Power, 29 Cal. App., 504. I am not going to go into the detail of these cases, because we will do it in the brief.

Now if a judgment is being tested,—and of course I need not cite any authorities, I am sure, to your Honor that it must be tested in the light of supporting what it sets out to do,—every intendment is in its favor; if it is ambiguous, you can go behind it and look at the record to find out what [91] was in the court's mind in making the judgment. If it is not ambiguous, then the judgment speaks for itself, and if there are two theories under which the judgment could have been rendered in a litigation, the theory must be adopted which validates the judgment and gives it effect. So that if your Honor could have held in this case that the liability of Lawrence to the Government was that of a superior for the delict of its agent, that theory is just as consistent and is just as valid in supporting and analyzing this judgment as it would be that they were joint tort feasors.

Now if it could be argued that the judgment is in any sense ambiguous or inconsistent or for any reason not clear, then the court—this court or a reviewing court—may look back to the findings or the

pleadings or the evidence to find out if it can be cleared up, and if there is anything at all that will give clarity to it, that must be adopted so that the judgment is supported.

In this case, fortunately, that very thing has been done. The Circuit Court of Appeals, in affirming your Honor in this case, analyzed these findings and this judgment and said that while the point was not very clear as to whether or not Lawrence had been held because of negligence as a joint tort feasor or for some other reason, the Circuit Court of Appeals had no difficulty in having clear in its mind what was in your mind. And reading from the opinion which appears [92] in our transcript at page 375, the Circuit Court said this:

"Now if Capitol was negligent in safeguarding the goods, it follows as a matter of course that the dereliction is imputable to its principal Lawrence. The latter argues that Capitol's negligence, if any, was not shown to be within the scope of its authority as an agent and that there was no finding that it was. While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency fully support that conclusion. Capitol or Lawrence, and in certain instances both, attempted to disclaim responsibility on the basis of the circumstances said to be peculiar to this case.

"We turn now to those special circumstances. One of them relates to the fact that the corporation"—which is the Government—"approved the selection

of the Ice Palace as a place of storage. We may assume that approval would relieve the warehouseman had some known defect in the premises been the cause of the loss, but such is not thought to be the situation here. The loss resulted from the use of the acetylene torch."

So if anyone wants to suggest that the judgment is not [93] clear and wants to go into the findings, I for one do not want to say that they ought to be interpreted in any different way than our Circuit Court of Appeals did, because they may have a chance to do it again, and I think it is fair to assume that they would read it in the same light. At any rate, that is fairly respectable authority for the fact that the basis of the liability of Lawrence not only could be, but couldn't be on any other basis than of imputed negligence of its agent.

Now I have discussed this——

The Court: Well, I do not think there is any doubt about that. The only question that your opponent raises is whether or not the judgment and the findings themselves, despite the fact that the court puts its decision on a different ground, would foreclose any resort to the opinion of the court or evidentiary matter.

Mr. Garrison: Well, I say that——

The Court: It seems like it pretty well simmers down to that question, because they always speak of these things as the findings of the court. We are still living in the old archaic world; we are naive enough to believe that Circuit Courts follow the practice of naively believing that the findings are the findings

of the court. They are not. They are prepared by the lawyers.

Mr. Garrison: That is right.

The Court: And if they don't prepare them well, then the [94] law falls upon them. Although some of us sometimes prepare our own findings, but most of the time the lawyers want to do that because they want to be sure that they protect their position. And sometimes they don't, and then they speak of them as the court's finding. It is like speaking of the court's instructions to juries in the State Courts. They are the lawyer's instructions, they are not the judge's instructions. In the Federal Courts we don't follow that as far as instructions are concerned; but as far as findings are concerned, I think most of the judges always take the findings the lawyers prepare, because, after all, it is their case, they have spent time on it; we take it for granted that they have considered the problems that are involved and are seeking to adequately protect their own rights. Of course these findings in this case, as I remember, were prepared by the plaintiff——

Mr. Garrison: By the Government.

The Court: The Government prepared the findings.

Mr. Garrison: That is right. We have no quarrel with the findings. We do not think there is any problem in connection with them. I am simply discussing this now because it has been raised and it has an answer.

In a minute I am going into the proposition that a finding of negligence against Lawrence presents

no difficulty whatever, because they were not tort feasors and the indemnity [95] liability could not arise unless there had been some fault on their part which created the judgment against them that they could collect. I am going to go into that in just a second.

The Court: Your point is, I take it, that when the court says, or when the lawyers say in the finding, that the negligence of the defendants McGrew, Lawrence Warehouse and Capitol Chevrolet concurred and joined together to destroy plaintiff's goods, that that does not necessarily mean that the negligence of the Lawrence Warehouse is referred to there as a kind of actual operative negligence, but rather it is the kind of negligence that the law stepped in and said——

Mr. Garrison: Exactly.

The Court: That it was the kind of liability described as negligence that the law stepped in and said that existed because of the imputation to them of the responsibility for the agent's acts.

Mr. Garrison: As the court said, it is imputed negligence; that is right. But I say, going a little back of that point—that is where we come to next—going back of that point they have raised a plea of res judicata. Res judicata under the Purcell case, is tested by looking at the judgment, not the findings. Now the judgment doesn't go into the theory behind the liability, it just says there is a liability. And that liability could have been imposed by reason of the doctrine of [96] respondeat superior as readily as on the basis of joint negli-

gence. It simply says there is a liability. So you test the plea of res judicata on the judgment, not the findings, and there is nothing about the judgment that creates any difficulty at all. The only time you look at the findings, I believe, is when the judgment is in doubt and there is a conflict.

The Court: Of course if this wasn't a judgment and finding of joint negligence, you wouldn't have a right to recover.

Mr. Garrison: Yes, I would.

The Court: As a joint tort feasor.

Mr. Garrison: Well, that is my next point.

The Court: All right.

Mr. Garrison: That is my next point. I am discussing this now quite aside from the basic point.

The Court: I see.

Mr. Garrison: I would have a right to recover without question; but I do want your Honor to have clearly in mind my point that the judgment and not the findings is the document that you look to on the question of the plea of res judicata.

The Court: I see.

Mr. Garrison: And that doesn't go into the question of negligence or imputed liability; it just simply goes into the [97] question that a liability existed, and it doesn't say——

The Court: It doesn't say anything about joint tort feasor.

Mr. Garrison: No, not a word. It could be on one theory or the other, as the judgment must be supported if there is any theory upon which it can be sustained.

The next question is, are we entitled to judgment against Capitol if we will assume in the judgment you had said that we were guilty of concurring negligence? And there isn't any question but that we are, so long as we are not joint tort feasors in the sense that we were independently negligent actors which, without any relationship to each other, our negligence was equal to the other defendants, and came together and created——

The Court: That is the same thing I just tried to say. You are saying the same thing I said about a minute ago when I said that if you were joint tort feasors that you couldn't recover, I meant that the law is settled that if you are actually a joint tort feasor you couldn't recover.

Mr. Garrison: That is right. That is right. Let's put it this way: if Lawrence's agent had been driving its automobile down the street and Capitol had been driving its automobile into an intersection, and they had collided and injured a third person, you see, then they are joint tort feasors and there can be no contribution between them. But we are not in [98] that situation here.

We are talking about indemnity between principal and agent. And the liability of the indemnitee does not arise until there is a judgment and some fault found on the indemnitee's part before they can ever recover against its indemnitor.

And I might say that this is probably as interesting a subject as you will find in a long time in dealing with the average case you come into. It is a point that sometimes people pass over by the glib

statement that "Joint tort feasors, no contribution; let's go to the next order of the day."

But starting back in 1895, the Supreme Court took up this question and discussed it very thoroughly in the case of Washington Gas Light vs. District of Columbia, 161 U.S., 316. And that is the beginning of the line of cases which has set up the indemnity contribution arrangement where the relationships are similar to those existing there and even where there is some fault on the part of the indemnitee.

The classical case is the one that happened in the Washington Gas Light case where a plaintiff was injured by having stepped into a hole in the sidewalk that had been created there by a gas box top that had been left off by the gas company. And they sued the District of Columbia, and of course recovered against the District of Columbia because the District of Columbia had an obligation imposed by law to [99] keep the streets safe. The District of Columbia turned right around and sued the gas company, and the court said that even though the District of Columbia might be negligent, it has a right to recover against the person who was primarily negligent, who was actively negligent, and whose active negligence created the condition that brought about the injury; and they started then the doctrine of active and passive negligence, primary and secondary, and determined that wherever a liability arises on someone because of the act of another for whom they are responsible, even though they may themselves be guilty of some fault, with-

out even a contract on the imputed liability, if the person primarily negligent, actively negligent, created the condition, and the liability of the indemnitee is simply one coming because of their passive fault. They go into the question of moral turpitude, the question of good faith and knowledge, and so forth. A great many cases are cited in this Gas Light case where they talk about the liability imposed because of the law and the relationship, and they distinguish very clearly between the joint tort feasor and this other indemnity arrangement. That case isn't too long, and when we file our brief we hope to discuss it in detail for your Honor. And I commend it to you as very interesting reading.

We are very fortunate in this case here in having this whole subject very beautifully analyzed for us by our own Circuit Court of Appeals in the case of Booth Kelly vs. [100] Southern Pacific. And it is a case so close in point that I wonder why the parties do not have the same name. It originated up in Oregon, or Washington, I believe. It was a case in which the Booth Kelly Company was a lumbering operation, and they entered into a contract with the Southern Pacific whereby the Southern Pacific agreed to run a line along their property, and they entered into an agreement in relation to the use of that track whereby it was agreed that the Booth Kelly would hold the Southern Pacific harmless from any loss or damage as is the case here, by reason of its neglect or that of its employees, and then it said that if it develops that in a given situation both the Southern Pacific and Booth Kelly are

negligent, then the loss to anyone sustained should be borne equally between them.

Well it happens that one of the brakemen on a Southern Pacific car moving on this track was injured by reason of a wood cart having been left closer to the track than the contract said they should, within a certain number of inches, and it struck the brakeman. The brakeman was injured and sued the Southern Pacific and recovered. So the Southern Pacific in turn is suing its indemnitor, as we are, and in the damage case the court found that the Southern Pacific was negligent because of failing to discover the condition and to warn the brakeman of it; that it had a duty to provide him a safe place to work and it had not done so; therefore it was guilty [101] of some negligence. So this case now is an action by Southern Pacific against Booth Kelly, its indemnitor, and every point raised here is in this case. In the trial, the District Court, the judge, concluded that if both of them were negligent and they had a provision in their contract of indemnity that they divided equally, that was pretty good for him, so he decided that they were both to take the judgment half and half. This court said no, that that wasn't what was contemplated in that agreement, what was contemplated in that agreement was a full indemnity; and it reversed the District Court and held that Booth Kelly should reimburse the Southern Pacific entirely for its loss in the payment of the judgment. And it goes on to explain very logically and very properly why. The court says in its decision——

The Court: I take it that the reason why they said that was because of the fact really that it was the negligence of the Booth Kelly Company.

Mr. Garrison: The primary, active negligence was on Booth Kelly, but there was some negligence on the part of the Southern Pacific, but it was not the negligence contemplated in their indemnity agreement; the indemnity agreement contemplated that there would be full indemnity. And the Court goes on to say—and I would like just very shortly to give you some of that language because it is very illuminating. It says: "Basic in any determination of the meaning of [102] this whole paragraph"—this indemnity paragraph—"is an understanding that when the parties contemplated that there might be claims for indemnity, cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, or otherwise no judgment could have been recovered against him. That this is typically true is recognized in the comment under Section 95, Restatement on Restitution. That comment is"——

Quoting from the Restatement——

"'In all of our situations the payor'"—who is Lawrence in our case and the Southern Pacific in that case—"'is not aware of the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned. In most of the cases it is because of this failure that he is liable. The fact that the payor knew of the existence of the dangerous condition is not of itself suf-

ficient to bar him from restitution. In many cases it is only because he had knowledge of the condition that he is liable to the person harmed.' ''

This is from the court, going back to the decision:

"If we were to assume that the existence of any negligence on the part of the Southern Pacific, [103] without regard to whether it be active or passive, primary or contributory necessarily threw the case within the last portion of the paragraph"—which is the one where they are fifty-fifty held equally—"then one might fairly ask, what sort of case must have been contemplated when the parties drew the first portion of it? as pointed out in that comment quoted in the Restatement. In most cases a liability which which indemnity is sought can arise only because the person claiming it was himself guilty of some negligence. In approaching a determination of the meaning of this whole paragraph, it appears to us initially that each part of the paragraph was intended to cover certain types of cases and that each part refers to a situation different from that contemplated by the other, and in view of the fact that in most cases where demand for indemnity arises, the claimed indemnitee must have been found liable by reason of some negligence, we think it extremely unlikely that all such cases were intended to be excluded from the operation of the first portion"—which is the full indemnity—"otherwise, this portion of the paragraph would have little or no application to any actual case."

The Court: Then goes on to refer to the com-

mon law relating [104] to indemnity and contribution and cites the Washington Gas Light case.

The Court: I didn't want to interrupt you, but I will have to look at that case anyhow.

Mr. Garrison: Well, yes, you will.

The Court: I understand that point. And all I had in mind was just a statement of the points.

Mr. Garrison: All right, but this is so very, very much on this case that I just wanted to read from it.

Counsel has cited a number of statutes of limitation. I won't extend the discussion on that, but the point is this: This indemnity agreement indemnified Lawrence against loss or damage. The cases are very clear that we are not entitled to indemnity until we have a loss or we are damaged, and the cases say that that loss or damage is payment of money. We didn't have to pay this money until we paid the judgment. Therefore, the statute could not start to run until that date, which was just here a few months ago. So the cases are very clear, and we will include those in our memorandum.

I think that that very briefly covers the points.

The Court: I understand the point.

Mr. Archer: May it please the court, we have already filed with our motions to dismiss a memorandum of points and authorities which sets out what would be called the law points in this case. I think you will find it attached to the motion [105] in 30473.

Now as to the meaning of the judgment. I agree with counsel that the judgment is conclusive in a

plea of res judicata; but the word "jointly" in there, as specifically held in this Adams vs. White Bus Line, means that there is no contribution. In other words, when this judgment was drafted, counsel used a word of art in California law, there is just no doubt about it. And the point there is that if Lawrence Warehouse was liable only on a respondeat superior theory, it was secondarily liable and a several judgment against each was all that could be given. A joint judgment against tort feasors is allowed, as said in this Adams against White Bus Line, only when they both particiipate and are primarily negligent.

Now I say that without reservation. And I took some time in the case to read the pleadings in the first action, because I say this was done designedly, because I think that is what counsel for Defense Supplies Corporation was doing. They averred joint and concurrent negligence and, as I pointed out, Lawrence Warehouse, by way of answer as well as cross-complaint, said, "No; if we are liable at all, we are only secondarily liable."

Now, your Honor, the cases in the California law —I have cited them—Salter vs. Lombardi, Bradley vs. Rosenthal, and Fimple vs. Southern Pacific, show conclusively [106] that when a master and servant are joined as defendants for a tort, the issue of the primary or secondary liability of the master is inevitably in issue, because the question of exoneration arises. That is, if the agent is set free —if it had been found there were no negligence on the part of Capitol from the standpoint of Defense

Supplies Corporation, if there had been only respondeat superior, that would have left both defendants out as between Lawrence and Capitol. On the other hand, with a finding——

The Court: Say that again. If there had been no what?

Mr. Archer: If it had been only on the theory of respondeat superior that Lawrence was held, and it was determined on appeal or subsequently that as a matter of fact Capitol was not negligent, as a matter of law, under California law that would have exonerated Lawrence.

The Court: I follow that.

Mr. Archer: That is clear. That is Hornbook law. On the other hand, if you had a finding of concurrent and joint negligence, as these cases state there could be no exoneration. And that is why Defense Supplies Corporation put that point in issue: Is Lawrence primarily or secondarily negligent? And that is why Lawrence Warehouse defended and said, "No, if we are negligent—if we are liable, we are only secondarily so." And the court answered, came right back with the findings and conclusions and judgment that said, "You were primarily liable." Now, your Honor, under the law of California these cases I have cited, there is just no——

The Court: I follow you on that, but I think the main question is, can you go behind that judgment.

Mr. Archer: Now we come to the question of whether it is conclusive.

The Court: Under the cases of master and servant, of course the judgment would apply.

Mr. Archer: All right. All right. I would like to state of course that it doesn't work conversely; that as far as the servant is concerned, it doesn't make any difference whether his acts are directed or not; in other words, if his acts were directed, he is entitled to indemnity from the principal but it doesn't affect his liability as to the others.

Actually this judgment is conclusive for several reasons.

In the first place, as a matter of evidence. As I stated before this morning, it is a question of the parol evidence rule, the rule of integration. It is In Re Crosby Stores Circuit Judge Swan lays the rule out right straight from Wigmore that judgment is a rule of compulsory integration. It is more so. People enter into negotiations; they don't have to make a contract; but when people enter into a trial and introduce evidence, the judge has to integrate that into the judicial record, which is conclusive on the parties and cannot be contradicted. As I say, you can have [108] additional evidence.

And then in this Louisiana Land and Exploration case, on page 4, they just set forth the general rule that in any event it cannot be contradicted.

The California cases that I have cited will show conclusively that the words "joint," "joint liability", and "joined" and the "acts joined and concurred together," preclude any possibility of liability on the theory of respondeat superior, and that if this court goes to the evidence to find liability as to whether it was solely on the theory of re-

spondeat superior, it will be contradicting the judicial record. And that just cannot be done.

And in fact, your Honor, the Court held that if the reason for the judgment and findings and conclusions was as counsel says against Lawrence Warehouse solely on respondeat superior, it was reversible error to enter a joint judgment against them and to say that their acts—and in finding No. 7 your Honor mentioned something about omission to act, or something like that—it says, "The acts of the defendants joined and concurred together—it was reversible error."

And at that point, if an appeal had ever been taken—as you know, there was a lot of conversation after your Honor spoke, but your Honor gave the final word in this case—if a proper appeal had been taken, it would have been reversible if that had been the only basis of judgment against [109] Lawrence.

The Court: The judgment should have been a several judgment?

Mr. Archer: It should have been a several judgment, and it should have said that Lawrence was negligent——

The Court: I guess there again the court has got some excuse for its opinion, maybe right or wrong.

Mr. Archer: If your Honor please, Lawrence Warehouse Company approved the judgment as to form.

And when it comes to counsel preparing it, there certainly was an adverse interest between Capitol

Chevrolet Company and Lawrence Warehouse Company when the findings and conclusions and judgment were prepared. And counsel for Capitol Chevrolet Company were entitled to rely that that was the judgment of the court, regardless of the opinion, regardless of the evidence or anything else: But that was what the court was ruling, and when they said they were joint and concurrent tort feasors that was what the court meant.

The Court: The question maybe should have been raised by the defendants.

Mr. Archer: Well, not by Capitol Chevrolet Company.

The Court: No.

Mr. Archer: That is exactly the point, your Honor; if a decision is res judicate, it is res judicate if it is dead wrong. There's no question about that. This is a [110] collateral attack on a judgment, there is no way of getting around that.

I have said before that this judgment was conclusive because of the rule of evidence: One, it was integrated; second, you can't contradict it.

The Court: Of course counsel read from the decision of the Court of Appeals which rested its affirmance upon the ground that the judgment against that——

Mr. Archer: There was nothing in the Court of Appeals. The Supreme Court says the action abated, the notice of appeal was properly filed.

The Court: No, no, that isn't what I mean, Mr. Archer. I mean the original case was appealed and the Court of Appeals affirmed it, in affirming it the

opinion recognized, as I recall the reading of it, that the basis of the judgment as against Lawrence was on the doctrine of imputed negligence.

Mr. Archer: Well, that may or may not be true; in other words, Lawrence may not have argued this other question, I don't know that; but the absolute answer to it is that the Court of Appeals opinion was of no legal effect. And in that opinion they said they didn't think the findings and conclusions were consistent with that. There was the clear opening. Of course they couldn't do anything, because there wasn't any party against whom the appeal was taken.

The Court: That is right. If Lawrence did not raise [111] that point on appeal and asked the court to modify the judgment to make it a several judgment instead of a joint judgment, of course then the Court of Appeals was not concerned with that, as long as the plaintiff was entitled to a judgment against both defendants.

Mr. Archer: Suppose the Court of Appeals had said it wasn't entitled to a judgment; suppose the Court of Appeals had said that your Honor found incorrectly, that there was no negligence, that would have no legal effect, because when it went up to the Supreme Court, the Supreme Court said there was a judgment rendered within the one year period, the Defense Supplies was never substituted, there was never any adverse party to that appeal and the proceedings in the Court of Appeal were of no effect, just as though nothing were done. So even if they ruled entirely against you on the evidence,

that opinion wouldn't mean anything, because there is only one judgment in this case, and that is the one you rendered on April 15, 1946. There was a lot of conversation after that, but that is the law. And if you had been reversed, it would have gone to the Supreme Court on behalf of the Government, where, in effect, the Supreme Court says, "You are not properly before us because there is no party here, you weren't properly before the Court of Appeal. The only thing to do is for the Reconstruction Finance to sue on the judgment" which was entered by your Honor. [112]

The Court: That is a little beside this case.

Mr. Archer: I just wanted to say that that opinion——

The Court: I am not so sure about that. We cannot agree about that.

Mr. Archer: I want to say that the opinion of the Court of Appeals is of no legal effect.

The Court: It really comes down—the strength of your argument really rests in the inviolability, as it were, of the words of this judgment, and if they stand your point is that there is no ground for relief here.

Mr. Archer: I say that is our principal point,—principal law point.

The Court: If you can go behind that, then there wouldn't be any doubt as to the real basis of the decision.

Mr. Archer: Now there you are. We are prepared to argue this on the evidence that Lawrence Warehouse Company undertook to provide watch-

men and that every act that Capitol Chevrolet Company did was under the direction of Lawrence Warehouse Company. In other words, no matter what this agreement says—I admit it does say some things—but subsequent to that—whether you want to review the acts subsequent to that as an executed parol agreement or the fulfilment of the principal directing the agent to do particular things, I don't think it makes much difference, but it was a principal and agent relationship. So that when, as between Lawrence and Capitol, where there [113] was this relationship, which wasn't between Defense Supplies and Lawrence or Defense Supplies and Capitol, when Lawrence said to "change your place of storage from your eleven warehouses to the Ice Palace to suit our convenience and we will provide watchmen," that in effect Lawrence undertook to do acts which he directed Capitol Chevrolet which he had no alternative to do.

The Court: The agreement between the Capitol Chevrolet Company and the Lawrence Warehouse Company was executed before the goods were first stored in the eleven warehouses?

Mr. Archer: That is right. That is right, your Honor, and the obligations of Capitol Chevrolet Company were set when there were eleven warehouses, but then when Lawrence came in and said, "Put them in the Ice Palace and we will provide watchmen," then the obligation had changed, and that, your Honor, is why I think that the Defense Supplies Corporation from the very first—and we have just been discussing at the very end of the case

—maintained the Lawrence Warehouse Company was a joint tort feasor because she had directed specific acts of Capitol Chevrolet Company and had undertaken to provide watchmen.

The Court: Of course what you have last said was really not actually before the Court at the time of the judgment in the first case.

Mr. Archer: Well, your Honor, certainly not until—— [114]

The Court: Your man, Mr. Kenyon, testified, but I don't recall there was any testimony about that in the other case.

Mr. Archer: Well, no, your Honor. Of course that has been our position from the beginning of this thing on the evidence. I mean that is raising another point here; but the issue of primary and secondary liability as far as Lawrence is concerned was in issue, but it certainly wasn't in issue as far as Capitol was concerned in this case. So on that evidence you could say as between the two—that is why we have objected to the court's allowing in this other evidence, because that was not an issue as far as Capitol was concerned although it was an issue as far as Lawrence was concerned. And it is Capitol against whom this evidence is offered. That is why we are producing testimony here now.

There is just one other point as far as the conclusiveness of that judgment, and that is the doctrine in Bernhard vs. The Bank of America which is cited on page 5 of our memorandum, in which California took a step out of the way from the law of the other states and said that a party can assert

the defense of res judicata even though it, the party asserting the defense, was not a party to the prior action as long as the party against whom it is asserted was a party. I don't have to dwell upon that because Bernhard against Bank of America is undoubtedly the law of California. It is not the law of Oregon; it is probably not the common law of [115] the United States, if there is any.

But I think that is another reason why the judgment is conclusive, because, as I pointed out, this issue of the primary or secondary liability of Lawrence was in issue between Lawrence and the Defense Supplies, because Lawrence expressly put it in issue. And that shows not only by the pleadings, but the judgment and findings so state.

As far as the agreement for indemnity goes, as I have pointed out, the obligation of Capitol Chevrolet Company undoubtedly changed when the storage was changed to the Ice Palace.

The second point I wanted to make in that regard was that the agreement did not enlarge or diminish the duty as between master and servant, because the agreement expressly provides that it would indemnify against loss or damage resulting from a failure on the part of the agent to perform any of the duties or obligations above set forth—in other words, the agent being Capitol.

Now just two final points, neither of which I have touched on before.

In considering this case I want the court, as I know the court will, to consider you have Capitol Chevrolet Company, who is a party in the original

action, and you have everybody else going out in two branches: on one side Mr. Kenyon, on the other side Adams Service Company as being successors to [116] Capitol Chevrolet Company.

Now it is the law—I think I can state it faster by reading; this is from the Court of Appeals of the Ninth Circuit, stating the law of California in Boulter vs. Commercial Standard Insurance Company. I haven't cited that in my memorandum. As I say, this is primarily a question of evidence and what is admissible against certain defendants. At page 768, the court said:

"Finally, appelle argues that the court should have upheld its plea of res judicata in which it set up its declaratory judgment. Notwithstanding that the Boulters were never served in the declaratory judgment suit, it is asserted that they are bound by that judgment because, it is argued, they were in privity with Warner. The rights which the Boulters acquired under the policy became vested long prior to the institution of the suit for declaratory judgment. Under the law of California which controls here, a privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties."—citing the Bank of America case.

"Further this court has quoted Freeman on Judgments, Section 162, to the effect that no one is in privy whose succession to the rights of property [117] thereby affected occurred previously to the institution of the suit."

So at this posture of the suit in both cases—no, only in the second case,—I can say there is just no evidence against anybody but Capitol Chevrolet Company, because the verification on that certificate of dissolution shows that dissolution had taken placed in 1943, one month before the original complaint by Defense Supplies Corporation was filed. These parties had acquired their interest before the institution of the suit.

Now if there were any way you could get around that—I mean your Honor may feel in some way disposed to get around that—well, it is up to the plaintiff and cross-complainant in the first case to prove his case by competent evidence—if he felt there were any way to get around that. That is why we have put into the record the portion where Mr. Kenyon very frankly stated that the company had been dissolved at the trial, and Mr. Getz also stated it, his counsel. And right there was just a red flag waving where counsel at that time to protect his rights had to move then to make these other persons parties to the judgment, and it was not done.

The Court: The corporation had already been dissolved?

Mr. Archer: That is right; it had been dissolved before the complaint of Defense Supplies had been filed. So there is just no evidence against these people, none at all. [118]

Now we have pleaded the Statute of Limitations.

The Court: Then it might have solved a great deal of everybody's troubles if a judgment in con-

tribution were ordered against the original Capitol Chevrolet Company.

Mr. Archer: Your Honor, of course that point——

The Court: But that is all your opponents could win in the case.

Mr. Archer: I couldn't raise that point. I don't know how the cross-claimant intended to prove its case. I do want to say: We are not denying liability. If I have an obligation and you assume it, you certainly are liable, but you are liable if somebody brings an action against me and recovers.

The Court: Wouldn't the liability of the corporation arise at the time that the cause of action arose?

Mr. Archer: Yes, your Honor, but I am talking about evidence. I am not saying that if competent evidence weren't introduced against the people who assumed the liability that they wouldn't be liable. As I say, if I have an obligation and you assume it, and somebody gets a judgment against me and then sues you, they still have to prove their case all over again.

The Court: I see.

Mr. Archer: And that is all I am saying, and that there is no evidence at all against those people which is admissible.

We have a reserved motion to strike, and we are going to [119] move to strike every bit of evidence against everybody but Capitol Chevrolet Company because there is just no basis for allowing it to come in.

The Court: There is evidence that Mr. Kenyon was a shareholder——

Mr. Archer: No; he acquired his interest prior. That was the certificate which we have put in evidence.

The Court: Yes, but not prior to the time that the cause of action arose.

Mr. Archer: Well, as the case I read stated, it is anybody who acquires their interest prior to the institution of the suit, not prior to the time of the cause of action. Actually, the law in California is that nobody is bound by a judgment unless they acquire their interest after the judgment.

The Court: That is on account of the doctrine of notice, I suppose?

Mr. Archer: It is not only notice, your Honor; but suppose that I buy property with the worst kind of notice that somebody else has some rights to it; if somebody brings an action against me, I am still entitled to my day in court and judgment on the law and the evidence. The fact that I have notice of some other judgment or some other lien is part of the proof to come in when they sue me.

The only other point I think is the question of the Statute of Limitations. Your Honor will remember that I read [120] to the court the portion wherein the cross-claim in the original action Lawrence Warehouse Company had claimed that Capitol Chevrolet Company was liable, and that Capitol Chevrolet Company denied liability. Well, naturally, the Statute did not begin to run in 23171, because that is still the same action; that tolls the action.

But I have a case here which holds expressly in an indemnity agreement situation where the indemnity is against loss and damage to hold harmless, that where there is a repudiation, the cause of action accrues at that time. That case I do not have in the memorandum, but I will put it in the one that we submit. It is Wahl vs. Cunningham, 320 Missouri, 57, 6 S.W. (2nd), 576. And in that connection——

The Court: What is the date of repudiation here?

Mr. Archer: In 1944 when the pleadings in the first case were filed. With a written agreement, five years would be '49 against everybody who isn't in the first case; that means everybody but Capitol Chevrolet Company.

The Court: Do you think that might be a repudiation?

Mr. Archer: Well, I can't think of a clearer repudiation. I mean there is certainly no question about it.

The Court: In other words, the denial of liability?

Mr. Archer: Yes, they pleaded it, that they had agreed to indemnify. They said Capitol Chevrolet Company had agreed to indemnify Lawrence Warehouse Company, and Capitol Chevrolet [121] Company denied that.

The Court: That is attaching considerable significance to a pleading.

Mr. Archer: I think it is attaching a significance to it in the most significant place where you can attach it, your Honor—right in court where they

are trying to collect. I mean, it would be so much conversation, perhaps, and revocable if you put it elsewhere, but on the fact of the election to sue, considering that doctrine, and you have the whole question of indemnity and notice to the defendant, and that sort of thing—when you put it in that kind of language——

The Court: That really only affects the rights of these other people.

Mr. Archer: That is right. That is right. It doesn't affect Capitol Chevrolet Company, because obviously it is not tolled in the first action. I think that is a summary of my points.

Mr. Garrison: May I take a couple of minutes to reply? I am just unable to resist, your Honor.

The Court: Yes.

Mr. Garrison: Because counsel has stated his points with such positiveness and finality that it is challenging.

On this thing about the judgment joined, and being all conclusive and settles all discussion, let me just read one [122] short line in an A.L.R. notation, which is very complete, as A.L.R. is when it deals with a subject, and we will give it to you in the brief:

"As between the several defendants therein, that is, in the first suit brought by the injured plaintiff against the present party defendants, a joint judgment establishes nothing but joint liability to the plaintiff. Which of the defendants should pay the entire judgment or what proportion each should pay

in each case in which he is partly liable is still unadjudicated."

The Court: Was that a case of principal and agent?

Mr. Garrison: That was a case where they held they were jointly responsible as joint tort feasors.

The Court: Your opponent's point I think is more directed to the application of that doctrine where there is a master and servant relationship, a principal and agent relationship, rather than in a case where there are just two ordinary joint tort feasors.

Mr. Garrison: I understood him to say that where you have the term "joint" in the judgment, it precludes any possible contribution, because not being several, it shows that there were joint tort feasors and it can't have contributions. That just isn't the law. In Hardy vs. Rosenthal, 2 Cal. App. (2nd), a very recent case where that [123] very situation arose, the parties involved themselves were sued, the defendants; judgment was rendered against them, and one was permitted to recover against the other.

The Court: You have said there are cases the other way on that point.

Mr. Garrison: I certainly do.

Now this point about people's interests coming in subsequently. What he is talking about is the interests of the Phelps coming in subsequently, and the Adams Service Company being the party in interest prior. The testimony of Mr. and Mrs. Phelps in these depositions, which we rely upon, on that sub-

ject is to this effect: Mrs. Phelps was the president; she never attended a meeting; the corporation never had an office; it had no books or records; she never recalls signing anything; she never participated in any way; she doesn't know why she was in it; she doesn't know whether the corporation still exists; she doesn't know whether it has any assets; she doesn't know where her stock is or if she ever got any; all she did was to do what her husband told her to, and she said, the lawyers.

Her husband, who owned the other half of Adams Service Company, testified in the deposition he knew nothing about the corporation, it was a lawyer's deal; he went along with it and signed the papers; it never had an office; he doesn't know where his stock is; he doesn't know when he acquired an [124] interest; he thinks it has some assets, but he doesn't know. And that is the corporation owned by Mr. and Mrs. Phelps entirely which was the interest that they say existed before they came in. If anybody reads those two depositions and says that corporation had any reality over and above the interest of Mr. and Mrs. Phelps, then I want to hear about it. They had a corporation purely for tax purposes; they owned it entirely; it never existed in fact; it was purely a fiction and that is very clear from those two depositions. So that is the fact regarding that.

The Court: I have got a pretty good idea what the case is about anyhow. I can probably do a better job with the briefs when I get them. I think I would prefer that you make these points with the

cases that support them. I would much prefer, if you don't mind, if you will just cite the cases and state what your view is as to the possible law involved. It is much easier for the court to follow that kind of brief, because I can always look up the cases myself. I am always more interested in what the lawyers might have to say than what they think some court had to say about it.

Mr. Archer: You mean you don't want us to set the cases out?

The Court: I want you to cite the cases, but I don't want you to say what they hold.

Mr. Archer: You mean to cite them but not to quote [125] extensively.

The Court: It makes it too hard to read. I have to look at the cases anyhow.

Mr. Archer: I understand.

The Court: I think most judges agree that they get more out of attorney's briefs when you say what you think about it. We can always look at the cases and see whether you are telling the truth; but when you have to read those long excerpts you get——

Mr. Archer: You have to go back to the case anyhow.

The Court: Mr. Garrison: I think you are filing the opening?

Mr. Garrison: Yes.

The Court: How much time do you wish?

Mr. Garrison: I think ten days is all we need.

Mr. Archer: I would have to ask for twenty days after receipt because of the connection with Los Angeles.

Mr. Garrison: That is all right.

The Court: Then ten, twenty, and ten to reply; is that satisfactory?

Mr. Archer: Yes, your Honor.

Mr. Garrison: Yes, your Honor.

The Court: The case will be submitted on that basis.

[Endorsed]: Filed March 11, 1952. [126]

No. 13840. United States Court of Appeals for the Ninth Circuit. Capitol Chevrolet Company, a corporation, Appellant, vs. Lawrence Warehouse Company, a corporation, Appellee. James A. Kenyon, Adams Service Co., a corporation, F. Norman Phelps and Alice Phelps, Appellants, vs. Lawrence Warehouse Company, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: May 15, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13840

CAPITOL CHEVROLET COMPANY, JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS and ALICE PHELPS,
Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
Appellee.

STATEMENT OF POINTS ON WHICH JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS WILL RELY

1. The Judgent and Findings of Fact (Findings, Nos. V, VI and VII) and Conclusions of Law (Conclusions, Nos. I and II) are unsupported by the evidence, in that absolutely no evidence was offered or admitted against appellants showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company, or caused any damage or loss to Lawrence Warehouse Company.

2. The Court erred in holding that the judgment in favor of Lawrence Warehouse Company against

Capitol Chevrolet Company in No. 23171 was binding on the above-named appellants because:

(a) Said judgment was not pleaded nor offered in evidence against said appellants;

(b) Said judgment was based solely on the evidence adduced at the trial of the complaint of Defense Supplies Corporation against Lawrence Warehouse Company, Capitol Chevrolet Company, et al., in which said appellants did not participate and were not given the opportunity to participate and did not defend on behalf of Capitol Chevrolet Company;

(c) Said appellants are not in privity with Capitol Chevrolet Company;

(d) Said appellants are not parties to said judgment;

(e) Said judgment was rendered subsequent to the trial of this action; and

(f) Said judgment was not a final judgment.

3. The Court erred in holding (if it did so hold) that the judgment in favor of Defense Supplies Corporation against Lawrence Warehouse Company, Capitol Chevrolet Company, et al., was binding on appellants because:

(a) They were not parties to said judgment nor in privity with any party to said judgment, nor did they defend on behalf of anyone who was a party to said judgment; and

(b) They did not participate in the trial in which evidence supporting said judgment was adduced.

4. The Court erred in finding (Findings, No. VIII) that James A. Kenyon and Adams Service

Co. actively participated in the defense of the complaint of Defense Supplies Corporation against Capitol Chevrolet Company because this question was never pleaded or otherwise placed in issue and because there is absolutely no evidence, and none was offered, on this issue.

5. The judgment against Capitol Chevrolet Company in No. 23171 must be reversed, thereby resulting in a reversal of the judgment in this action.

6. The Court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company or was solely negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII, XXIII) because:

(a) Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store tires and tubes of Defense Supplies Corporation in the "Ice Palace" knowing of its fire hazards;

(b) Lawrence Warehouse Company undertook to provide and did provide watchmen for the "Ice Palace" whose duty it was to protect tires and tubes of Defense Supplies Corporation from damage by fire and who had actual knowledge of the acts of

V. J. McGrew which caused the damage to said tires and tubes;

(c) Lawrence Warehouse Company, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determinations therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation (See Findings, No. XVI).

7. The Court erred in finding (Findings, No. XX) as not true that Capitol Chevrolet Company had no dominion or control over the lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore because as to said appellants no evidence was offered or admitted on this question.

8. The Court erred in finding (Findings, No. X) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company in the amount of $42,171.70 plus interest at the rate of 7 per cent per annum from April 15, 1946, to and including November 21, 1951, and costs in the amount of $20.00, and in finding (Findings, No. XI) that on or about December 1, 1951, while said judgment was still in force and unsatisfied, cross-claimant, Lawrence Warehouse Company, paid plaintiff Reconstruction Finance Corporation the sum of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff because:

(a) Said judgment was not, and is not now, final but is subject to revision at any time, inasmuch as

all the claims in Action No. 30473 have not been disposed of.

9. The Court erred in finding (Findings, No. VIII) that F. Norman Phelps and Alice Phelps, or either of them, were the alter ego of Adams Service Co., or otherwise liable for the obligations of Adams Service Co.

10. The Court erred in failing to hold that the cross-claims of Lawrence Warehouse Company were barred by the statute of limitations (C.C.P. sec. 337(1)).

11. The Judgment, Findings of Fact and Conclusions of Law are unsupported by the evidence.

12. For the foregoing reasons the Court erred in granting judgment in favor of Lawrence Warehouse Company and in refusing to grant judgment in favor of appellants, and each of them (Conclusions, Nos. I, II).

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps

[Endorsed]: Filed May 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS OF PORTIONS OF RECORD

1. The following Docket Entries in No. 30473: Nos. 1, 4, 7, 9, 13, 14, 17, 18, 20, 21, 25, 26.

2. Complaint of Reconstruction Finance Corporation filed April 12, 1951, in No. 30473.

3. Answer of James A. Kenyon filed May 28, 1951, in No. 30473.

4. Answer and Cross-Claim of Lawrence Warehouse Company filed June 6, 1951.

5. Judgment filed November 20, 1951, in No. 30473.

6. First Amended Answer of Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. to Cross-Claimant of Lawrence Warehouse Company filed January 4, 1952, in No. 30473.

7. The following portions of the transcript of hearing on January 8 and 9, 1952:

(a) Page 3, lines 1 to 24;

(b) Page 28, line 17, to and including page 29, line 24;

(c) Page 63, line 10, to and including page 65, line 8;

(d) Page 68, line 20, to and including page 69, line 13.

8. Amendment to Cross-Claim of Lawrence Warehouse Company filed February 15, 1952, in No. 30473.

9. Answer of Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. to Amendment to Cross-Claim of Lawrence Warehouse Company filed February 5, 1952, in No. 30473.

10. Motion of Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps to Dismiss Cross-Claim of Lawrence Warehouse Company filed March 5, 1952, in No. 30473.

11. Answer of F. Norman Phelps and Alice Phelps to Cross-Claim of Lawrence Warehouse Company filed March 5, 1952, in No. 30473.

12. Answer of F. Norman Phelps and Alice Phelps to Amendment to Cross-Claim of Lawrence Warehouse Company filed March 5, 1952, in No. 30473.

13. Reporter's Transcript of Proceedings on March 5, 1952, including Exhibit F. (Also designated by Capitol Chevrolet Company.)

14. Interrogatories by Lawrence Warehouse Company to James A. Kenyon filed November 29, 1952, in No. 30473.

15. Answers by James A. Kenyon to Interrogatories of Lawrence Warehouse Company filed on March 5, 1952, in No. 30473.

16. Interrogatories by Lawrence Warehouse Company to Capitol Chevrolet Company filed on November 29, 1952, in No. 30473.

17. Answers by Capitol Chevrolet Company to Interrogatories of Lawrence Warehouse Company filed January 9, 1952, in No. 30473.

18. Interrogatories by Lawrence Warehouse Com-

pany to Capitol Chevrolet Co. filed November 29, 1952, in No. 30473.

19. Answers by Capitol Chevrolet Co. to Interrogatories of Lawrence Warehouse Company filed January 9, 1952, in No. 30473.

20. Deposition of F. Norman Phelps in No. 30473.

21. Deposition of Alice Phelps in No. 30473.

22. Order for Judgment filed September 12, 1952, in No. 30473. (Also designated by Capitol Chevrolet Company.)

23. Order Amending Order for Judgment filed January 15, 1953, in No. 30473. (Also designated by Capitol Chevrolet Company).

24. Findings of Fact and Conclusions of Law filed February 11, 1953, in No. 30473. (Also designated by Capitol Chevrolet Company.)

25. Judgment entered February 12, 1953, in No. 30473. (Also designated by Capitol Chevrolet Company.)

26. Order Pursuant to Rule 54(b) filed March 3, 1953, in No. 30473.

27. Notice of Appeal by James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps filed March 10, 1953, in No. 30473.

28. Designation of Record on Appeal by Appellants filed March 12, 1953, in No. 30473.

29. Order Re Motion to Strike Designations in Record on Appeal filed April 15, 1953.

30. Statement of Points on which Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps will rely on Appeal.

31. This Designation of Portions of Record to be printed.

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps

[Endorsed]: Filed May 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH CAPITOL CHEVROLET COMPANY WILL RELY

1. The Court erred in admitting as evidence and considering as evidence at the trial of the cross-claims of Lawrence Warehouse Company the transcript of evidence (including the transcript of testimony and exhibits) adduced at the trial of the complaint of Defense Supplies Corporation (See Findings, first paragraph, Nos. XV, XVI).

(a) Said evidence was the only evidence offered to show that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Com-

pany, or caused any damage or loss to Lawrence Warehouse Company with regard to the storage of tires and tubes belonging to Defense Supplies Corporation.

2. The Judgment and Findings of Fact (Findings, Nos. V, VI and VII) and Conclusions of Law (Conclusions, Nos. I and II) are unsupported by the evidence because the evidence offered and considered was insufficient to show that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company, or caused any damage or loss to Lawrence Warehouse Company arising from the storage of tires and tubes belonging to Defense Supplies Corporation.

3. The Court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company or was solely negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII, XXIII) because:

(a) Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store tires and tubes of Defense Supplies Corporation in the "Ice Palace" knowing of its fire hazards;

(b) Lawrence Warehouse Company undertook to provide and did provide watchmen for the "Ice Palace" whose duty it was to protect tires and tubes of Defense Supplies Corporation from damage by fire and who had actual knowledge of the acts of V. J. McGrew which caused the damage to said tires and tubes;

(c) Lawrence Warehouse Company, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determinations therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation (See Findings, No. XVI).

4. The Court erred in finding (Findings, No. XX) as not true that Capitol Chevrolet Company had no dominion or control over the lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

5. The Court erred in finding (Findings, No. X) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company in the amount of $42,171.70 plus interest at the rate of 7 per cent per annum from April 15, 1946, to and including November 21, 1951, and costs in the amount of $20.00, and in finding (Findings, No. XI) that on or about December 1, 1951, while said judgment was still in force and unsatisfied, cross-claimant Lawrence Warehouse Company, paid plaintiff Reconstruction Finance Corporation the sum of $58,859.90

in full satisfaction and discharge of said judgment in favor of said plaintiff because:

(a) Said judgment was not, and is not now, final but is subject to revision at any time, inasmuch as all the claims in Action No. 30473 have not been disposed of;

(b) No evidence was offered or admitted to show that the judgment in Civil Action No. 30473 in favor of Reconstruction Finance Corporation was based on the judgment in Civil Action No. 23171, or that said judgment in Civil Action No. 30473 was paid by Lawrence Warehouse Company.

6. For the foregoing reasons the Court erred in granting judgment in favor of Lawrence Warehouse Company and in refusing to grant judgment in favor of Capitol Chevrolet Company (Conclusions, Nos. I, II).

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant, Capitol Chevrolet Company

[Endorsed]: Filed May 25, 1953. Paul P. OBrien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY CAPITOL CHEVROLET COMPANY OF PORTIONS OF RECORD

1. The following Docket Entries in No. 23171: Nos. 1, 4, 7, 8, 9, 14, 17, 18, 20, 21, 22, 23, 24, entry dated February 20, 1946, 43, 49, 60, 62, 65, 67, 68, 78, 82, entry dated November 21, 1952, 83, 84 and 88.

2. Complaint of Defense Supplies Corporation in No. 23171 filed February 16, 1944.

3. Answer to Complaint and Cross-Complaint of Capitol Chevrolet Company filed April 14, 1944, in No. 23171.

4. Answer to Complaint and Cross-Claim of Lawrence Warehouse Company filed May 17, 1944, in No. 23171.

5. Notice of Time and Place of Trial filed November 24, 1944, in No. 23171.

6. The following portions of the Transcript of Trial and Exhibits dated February 13-15, 1945, in No. 23171:

(a) Appearances, page 2;

(b) Statement of Mr. Wallace, page 9, line 2, to and including page 10, line 7;

(c) Testimony of Clyde W. Henry, page 60, line 6, to and including page 85, line 14;

(d) Testimony of Gordon Kenyon, page 85, line 20, to and including page 99, line 20;

(e) Testimony of James A. Kenyon, page 99, line 22, to and including page 101, line 3;

(f) Testimony of William C. Hanley.

Direct examination by Mr. Lombardi, page 104, line 8, to and including page 105, line 13;

(g) Testimony of V. J. McGrew.

Direct examination by Mr. Lombardi, page 105, line 16, to and including page 110, line 22;

Cross-examination by Mr. Gommo, page 139, lines 12-17;

Cross-examination by Mr. Getz, page 149, line 1, to and including page 152, line 5;

Cross-examination by Mr. Hughes, page 157, line 19, to and including page 162, line 16;

(h) Testimony of W. R. Kissell.

Examination by Mr. Miller, page 173, line 11, to and including page 177, line 18;

Cross-examination by Mr. Getz (including statements of counsel), page 177, line 21, to and including page 185, line 25;

Examination by Mr. Miller, page 186, line 3, to and including line 9.

Examination by Mr. Getz, page 190, line 22, to and including page 191, line 1;

Statements of Counsel, page 200, line 4, to and including page 202, line 19;

(i) Exhibits Nos. 1, 6, 8, 9, 10, 11, 13, A.

7. Opinion of Court filed January 9, 1946, in No. 23171.

8. Findings of Fact and Conclusions of Law filed April 15, 1946, in No. 23171.

9. Judgment filed April 15, 1946, in No. 23171.

10. Substitution of Counsel filed March 7, 1951, in No. 23171.

11. First Amended Answer of Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company filed March 3, 1952, in No. 23171.

12. Order consolidating No. 23171 with No. 30473 for trial filed March 3, 1952.

13. Reporter's Transcript of Proceedings on March 5, 1952, including Exhibit F.

14. Notice of Motion by Capitol Chevrolet Company to Strike Evidence filed April 11, 1952, in No. 23171.

15. Order for Judgment filed September 12, 1952, in No. 23171.

16. Order Amending Order for Judgment filed January 15, 1953, in No. 23171.

17. Findings of Fact and Conclusions of Law filed February 11, 1953, in No. 23171.

18. Judgment entered February 11, 1953, in No. 23171.

19. Notice of Appeal filed March 10, 1953, in No. 23171.

20. Designation of Record on Appeal by Appellant filed March 12, 1953, in No. 23171.

21. Statement of Points on which Capitol Chevrolet Company Intends to Rely on Appeal.

22. This Designation of Portions of Record to be printed.

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant, Capitol Chevrolet Company

[Endorsed]: Filed May 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY LAWRENCE WAREHOUSE COMPANY OF PORTIONS OF RECORD

Items filed and numbered in Action No. 23171-G alone:

1. Reporter's Transcript and all exhibits and evidence admitted and filed; excepting Exhibits 4, 5, 14, A and B.

2. Mandate of The Court of Appeals.

3. Page 23, lines 5 to 10, of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"If liability on the part of Capitol Chevrolet Company exists, it is true that this liability was expressly assumed by James A. Kenyon and Adams Service Co., and their successors and privies except Capitol Service Co., and the new corporation. It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Co. is liable."

4. Page 1 of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"Answering Memorandum of Cross Defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps."

Items filed and numbered in Action No. 30473 alone:

1. Answer of defendant Capitol Chevrolet Co.;

2. Return of Summons to Alice and F. Norman Phelps;

3. Answer of Cross-Defendant Capitol Chevrolet Co. to Cross-Claim of Lawrence Warehouse Company;

4. Answer of Cross-Defendant Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company;

5. Answer of Cross-Defendant James A. Kenyon to Cross-Claim of Lawrence Warehouse Company;

6. Assignment of Judgment, dated November 29, 1951;

7. Notice of Payment of Judgment and Claim to

Contribution or Repayment, dated December 6, 1951;

8. Notice of Time and Place of Taking Deposition of Alice Phelps;

9. Amendments by James A. Kenyon and Adams Service Co. to Findings of Fact and Conclusions of Law as Proposed by Lawrence Warehouse Company;

10. Transcript of hearing on January 8 and 9, 1952.

Items filed and numbered in both Actions Nos. 23171-G and 30473:

1. Notice of Motion and Motion of Cross-Claimant Lawrence Warehouse Company for an Order Vacating the Submission of the Above-entitled Cause and to Reopen the Same for Further Hearing and Evidence on the Question of the Liability of Certain Defendants;

2. Notice of Motion and Motion for an Order Modifying Opinion and Order for Judgment;

3. Memorandum of Court upon Signing of Judgment, dated February 11, 1953;

4. Stipulation and Order Extending Time to File Opening Brief of Lawrence Warehouse Company until March 25, 1952;

5. All exhibits and evidence not designated by Appellant admitted in trial of cross-claims 23171-G and 30473;

6. Stipulation and Order dated April 24, 1952;

7. Designation by Cross-Claimant and Appellee, Lawrence Warehouse Company, of Portions of Rec-

ord, Proceedings and Evidence to be Contained in Record on Appeal;

8. Notice of Motion to Strike or Consolidate the Designations of Cross-Defendants and Their Notices of Appeal, filed March 26, 1953;

9. Supplemental Designation by Cross-Claimant and Appellee, Lawrence Warehouse Company, of Record on Appeal, filed April 17, 1953;

10. This Designation by Lawrence Warehouse Company of Portions of Record to be Printed.

Dated: June 4, 1953.

/s/ W. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Appellee

Acknowledgment of Service attached.

[Endorsed]: Filed June 4, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION THAT PRINTED TRANSCRIP OF RECORD IN CAUSE NO. 11418 MAY BE CONSIDERED TO BE PART OF THE RECORD

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that upon the appeal of the above-entitled cause the court may consider, as being and constituting a portion of the record on appeal, the printed tran-

script of record on appeal in Cause No. 11418 on file in the above-entitled court.

The parties respectfully show that the following items designated by the parties to this appeal have heretofore been printed in the printed transcript of record in Cause No. 11418:

Items designated by appellant Capitol Chevrolet Company:

1. Complaint of Defense Supplies Corporation filed in Civil Action No. 23171.

2. Answer to Complaint and Cross-Complaint of Capitol Chevrolet Company filed in Civil Action No. 23171.

3. Answer to Complaint and Cross-Claim of Lawrence Warehouse Company filed in Civil Action No. 23171.

4. Portions of Transcript of Trial on February 13-14, 1945, filed in Civil Action No. 23171.

5. Exhibits Nos. 1, 6, 8, 9, 10, 11, 13 filed in Civil Action No. 23171.

6. Opinion of the Court filed January 9, 1946, in Civil Action No. 23171.

7. Findings of Fact and Conclusions of Law filed April 15, 1946, in Civil Action No. 23171.

8. Judgment filed April 15, 1946, in Civil Action No. 23171.

Items designated by Lawrence Warehouse Company:

1. Reporter's Transcript and all exhibits and evidence admitted and filed in the trial on February 13-15, 1945, in Civil Action No. 23171, except Exhibits Nos. 4, 5 and A.

The parties hereto further respectfully show that Exhibits A, B, C, D and E in the consolidated trial of the cross-claims in Civil Actions Nos. 23171 and 30473 designated by Lawrence Warehouse Company are printed in said transcript of record on appeal in Cause No. 11418.

Dated: San Francisco, June 8, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants
/s/ W. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Appellee, Lawrance Warehouse Company

It is so ordered this 9th day of June, 1953.

/s/ WILLIAM DENMAN,
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
Judges of the United States Court of Appeals

[Endorsed]: Filed June 11, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION BY LAWRENCE WAREHOUSE COMPANY OF PORTIONS OF RECORD

Amending Item No. 1 under "Items Filed and Numbered in Action No. 23171-G Alone" of Designation by Lawrence Warehouse Company of Portions of Record to be Printed to read:

"1. Reporter's Transcript and all exhibits and evidence admitted and filed, excepting Exhibits 4, 5, 14, A and B."

Dated: June 10, 1953.

/s/ W. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Appellee

Acknowledgment of Service attached.

[Endorsed]: Filed June 11, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION BY CAPITOL CHEVROLET COMPANY OF PORTIONS OF RECORD

Comes now appellant Capitol Chevrolet Company and designates for printing the stipulation and order filed June 11, 1953, that the printed transcript of the record in Cause No. 11418 be considered to be part of the record on appeal in the above-entitled action.

Dated: San Francisco, June 19, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant, Capitol Chevrolet Company

Acknowledgment of Service attached.

[Endorsed]: Filed June 19, 1953. Paul P. O'Brien, Clerk.

No. 13,840

IN THE

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY,
a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

REPLY BRIEF FOR APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
Crocker Building, San Francisco 4, California,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Pacific Mutual Building, Los Angeles 14, California.

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

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No. 13,840

IN THE

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LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

REPLY BRIEF FOR APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS.*

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*Counsel for all appellants, being of the opinion that no reply brief in behalf of Capitol Chevrolet Company is called for, are not submitting a reply brief in behalf of that appellant.

I. THE DISTRICT COURT IGNORED FUNDAMENTAL PRINCIPLES OF DUE PROCESS OF LAW TO HOLD THESE APPELLANTS BOUND BY EVIDENCE WHICH WAS NOT OFFERED AND COULD NOT HAVE BEEN OFFERED AGAINST THEM.

In appellants' opening brief it was asserted that there was absolutely no evidence offered or admitted against them showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company or incurred any obligation to Lawrence Warehouse Company (Appellants' Op. Br. 16, et seq.). The answering brief of appellee admits that the only evidence on these points was the judgment rendered after the trial of this action in favor of Lawrence Warehouse Company (hereinafter referred to as "Lawrence") against Capitol Chevrolet Company (hereinafter referred to as "Capitol") (Appellee's Br. 42, et seq.). Appellee's brief further admits that this judgment was not pleaded, proved or mentioned during the course of the trial (Appellee's Br. 43). In appellants' opening brief it was demonstrated that this judgment could not be binding upon these appellants for the following separate and independent reasons (Appellants' Op. Br. 25, et seq.):

1. It was not offered or admitted against appellants to show a liability of Capitol to Lawrence.

2. Appellants are not parties to the judgment in favor of Lawrence against Capitol nor are they in privity with Capitol nor did they aid or participate in or have the right to control the defense of the action in which that judgment was rendered.

3. Under the decisions of the Supreme Court of the United States the judgment against Capitol, not being final, cannot be *res judicata* against appellants.

It was asserted in appellants' opening brief that there was no reference during the trial of the cross-claims, including the argument of counsel and the pleadings, to the fact that Lawrence would rely on any judgment it might recover in the future against Capitol to prove its case (Appellants' Op. Br. 23-24). Appellee's brief confesses that this is true and seeks to avoid this argument by asking the question of how one could plead or offer in evidence in a consolidated action a judgment not yet rendered (Appellee's Br. 43). The answer is simple: Counsel need only have stated in the pleadings, at the pre-trial conference, or at the trial that this judgment, if obtained, would be relied on. Appellee further states that the court could take judicial notice of the judgment to be rendered against Capitol. In support of this contention, appellee's brief cites five cases (Appellee's Br. 38). In none of the cases cited by appellee did the court hold that judicial notice could be taken of a judgment as evidence of liability against or as binding upon one who was not a party to the judgment. Diligent search by counsel for appellants has not revealed any case which has so held. The reason for this is obvious. Before any judgment can be held to be evidence or an estoppel against one who is not a party to the judgment, it must be established that such person was in privity with the party to the judgment in the strict sense of the term or that he aided in the prosecution or defense of the action and had the right to participate and control such prosecution or defense.

Hy-Lo Unit & Metal Products Co. v. Remote C. Mfg. Co., 83 F. 2d 345 (9th Cir. 1936).

These questions are matters of pleading and proof. Judicial notice of a judgment in such case cannot be reconciled with the requirements of due process.

Dillard v. McKnight, 34 C.2d 209, 209 P.2d 387 (1949).

Furthermore, appellee's brief wholly ignores the established rule of law that a plaintiff waives its right to rely on a former judgment as an estoppel by failing to plead it or to offer it in evidence.

Wolfsen v. Hathaway, 32 C.2d 632, 638, 198 P.2d 1 (1948).

The Federal Rules of Civil Procedure follow this rule by requiring the pleading of judgments not only as affirmative defenses (Rule 8(c)) but as special matters in either complaint or answer (Rule 9(e)).

In appellants' opening brief it was asserted that appellants are not in privity with Capitol so as to permit that judgment to be used against them (Appellants' Op. Br. 28, et seq.).

Boulter v. Commercial Standard Ins. Co., 175 F.2d 763 (9th Cir. 1949);

Bernhard v. Bank of America, 19 C.2d 807, 122 P. 2d 892 (1942).

Appellee admits that appellants acquired their interests in the assets of Capitol and agreed to indemnify Capitol before the action by Defense Supplies Corporation was commenced and long before judgment was rendered in that action (Appellee's Br. 9, 45-46). Although appellee's brief asserts that appellants are in privity of contract and in privity of estate with Capitol, no cases are cited in sup-

port of the proposition that one who acquires his interest in the estate of a party *prior* to the commencement of an action and who assumes the liabilities of a party *prior* to the commencement of an action is in privity with such party so as to be bound by a judgment against that party. In fact, one case cited by appellee holds, directly to the contrary, that an assignee was bound only because the assignment was made *after* the action was commenced.

Bates v. Berry, 63 Cal. App. 505, 219 Pac. 83 (1923), hearing in Supreme Court denied.

Actually, however, the law as finally established in California and now uniformly followed is that one is bound by a judgment against another only if one's interest is acquired *after* judgment.

Bernhard v. Bank of America, 19 C.2d 807, 811, 122 P.2d 892 (1942).

One case cited by appellee in which a party was held to be bound by a judgment to which it was not a party is *Kruger v. California Highway Indem. Exch.* 201 Cal. 672, 258 Pac. 602 (1927), certiorari denied, 275 U.S. 568. That case is patently distinguishable. It involved a contract of an insurance company pursuant to an ordinance by which the insurance company was required to agree and did agree to be bound by any judgment recovered against the insured by a third person.

In appellants' opening brief it was asserted that there was no evidence showing that these appellants aided in the defense of the action against Capitol or had the right to participate and control the defense of the action against Capitol by Defense Supplies Corporation (Appellants'

Op. Br. 30, et seq.). It is further asserted in appellants' opening brief that in the pleadings and during the course of the trial it was never contended by Lawrence that these appellants had participated in the action by Defense Supplies Corporation (Appellants' Op. Br. 30). Appellee's brief, in effect, admits that these statements are true because nowhere in appellee's brief is any statement or evidence referred to which would show the contrary. It was pointed out in appellants' opening brief that the only trial in which it is asserted by Lawrence that any evidence of Capitol's liability to Lawrence was introduced was at the trial of the claim of Defense Supplies Corporation in which these appellants did not participate (Appellants' Op. Br. 30). This statement has not been controverted in appellee's brief. Finally, appellee not only has cited no case holding that appellants can be bound by a judgment rendered on evidence introduced at a trial in which they did not participate but has not even attempted to distinguish the leading and controlling case to the contrary.

Dillard v. McKnight, 34 C. 2d 209, 209 P.2d 387 (1949).

Appellants asserted in their opening brief that the judgment in favor of Lawrence against Capitol in Action No. 23171 was not final at the time of the trial of Lawrence's claim against these appellants and is not final even today because no express determination and direction, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, were made in regard to that judgment (Appellants' Op. Br. 35, et seq.). Appellee admits that the judgment was not final at the time of trial but seeks to

answer this question first by contending that such determination and direction were made, second by contending that although not final for purposes of appeal, the judgment is nevertheless binding upon these appellants, and thirdly, even though not binding, the judgment is evidence of the liability.

As to the first contention, Rule 54(b) of the Federal Rules of Civil Procedure, reads as follows:

> "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. As amended Dec. 27, 1946, effective March 19, 1948."

In an attempt to say that the required determination and direction were made, appellee refers to the Order for Judgment (Tr. 29, in 13840), wherein the court refers specifically to Action No. 23171 and thereafter refers specifically to a judgment to be rendered in Action No. 30473, and which document is entitled in both actions, No. 23171 and No. 30473. Obviously, this document does not contain the express determination required by Rule 54(b)

in order for a judgment to be final. Appellee's brief then argues that the only order pursuant to Rule 54(b) (Tr. 179 in 13840) applies to the judgment against Capitol and in favor of Lawrence in Action No. 23171. Appellee makes this argument in the face of the facts that that order is entitled *only* in Action No. 30473; that it refers *only* to the "judgment in the above-entitled action" and that this document was signed by the court and bears no indication that it was submitted by any counsel in the action. It is true that this order was entered pursuant to a notice of motion by counsel for these appellants. This motion was not printed in the Transcript of Record in this action but was transmitted to the Court of Appeals. For the convenience of the court the notice of motion is printed as an appendix to this reply brief. Perusal of this notice of motion shows not only that it was entitled *only* in Action No. 30473 and that the order pursuant to Rule 54(b) was requested *only* in regard to the "judgment in the above-entitled action" but that counsel for Lawrence expressly agreed and consented that the court could make such an order "in the above-entitled action." Thus it is apparent that court and counsel were at all times aware of the parties and claims in the two separate actions so that it could not have been through inadvertence that the order and determination pursuant to Rule 54(b) were entered only as to the judgment in Action No. 30473. Conclusive on this point is the fact that the judgment itself meticulously segregates the determinations of the cross-claim "in action numbered 23171" in one paragraph from the determination of the cross-claims "in

action numbered 30473'' in two other paragraphs (R. 132-133 in 13840). Appellee has cited no case since the amendment of Rule 54(b), effective March 19, 1948, holding that a judgment as to less than all the claims is final for purposes of appeal or for any purpose without the express determination and direction required by the Rule. Clearly, the judgment in favor of Lawrence against Capitol in Action No. 23171 is not final, if the Federal Rules of Civil Procedure are to be followed.

To the contention of appellee that a judgment not final for purposes of appeal under Rule 54(b) may nevertheless be final for purposes of *res judicata,* it should be sufficient to point out that the only cases cited by appellee in support of this proposition are not in point because they relate to the situation which existed before the amendment to Rule 54(b), with which we are now concerned. Prior to this amendment, there was considerable conflict in the cases as to when a judgment was final, and it was to eliminate precisely this conflict that Rule 54(b) was amended. (See Notes of Advisory Committee on Amendments to Rules, following 28 U.S.C.A., Rule 54(b)). That Rule 54(b) relates to finality for all purposes and not only purposes of appeal is demonstrated by the concluding sentence of the Rule, which states:

> ''* * * and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.''

How a judgment, which is subject to revision, can be *res judicata* and more binding collaterally than directly has

not been pointed out. In fact it was precisely this contention which the Supreme Court of the United States rejected in *Merriam v. Saalfield,* 241 U.S. 22 (1916).

Appellee then contends that although not an estoppel against appellants, the judgment against Capitol in Action No. 23171 is evidence admissible against appellants. The last sentence above quoted of Rule 54(b) also answers this contention. It would be manifestly unjust to grant any weight, even as evidence, to so ephemeral a determination. The cases of *Lake County v. Massachusetts Bonding & Ins. Co.,* 84 F.2d 115 (5th Cir. 1936), and *Lake County v. Massachusetts Bonding & Insurance Co.,* 75 F. 2d 6 (5th Cir. 1935), cited by appellee, do not support appellee's proposition. Those cases both involve final judgments. It should be pointed out that those cases are further distinguishable from the instant case because they hold that a judgment recovered against an assured by a third party may be presumptive evidence of the amount of the liability in an action by the assured against the surety company. As applied to the instant action appellants have no quarrel with this proposition. Admittedly, a final judgment by Reconstruction Finance Corporation against Lawrence, if a final judgment had been made, would be *prima facie* proof of the amount of Lawrence's liability to Reconstruction Finance Corporation; it would in no way establish appellants' liability to Lawrence. To the tenuous argument that appellants are sureties of Lawrence (Appellee's Br. 51), appellants point out that in an opinion by Chief Judge Denman this court has held that Lawrence's right to recover is as a third-party beneficiary

of the assumption contract which appellants made with Capitol.

Buck v. Kleiber Motor Co., 97 F. 2d 557 (9th Cir. 1938).

In appellants' opening brief it was asserted that the principal question for decision in this action was whether the District Court could ignore fundamental principles of due process of law to hold these appellants bound by evidence which was not offered and could not be offered against them (Appellants' Op. Br. 3). Appellee's brief has pointed to no evidence which was offered against these appellants to prove Capitol's liability to Lawrence and no cases have been cited dispensing with this element of proof in Lawrence's case. Tersely stated, the argument of appellee is that appellants should be held liable to Lawrence because they assumed the liabilities of Capitol although no proof was offered or could have been offered against appellants to show any liability of Capitol to Lawrence. The court is asked to dispense with traditional Anglo-American principles of justice to hold that because of a liability presumed to have been proved in another case to which appellants were not parties, appellants are liable to appellee.

II. THE APPEAL IN ACTION NO. 30473 SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO ENTER JUDGMENT FOR APPELLANTS.

The foregoing discussion establishes that appellee failed to produce any evidence against these appellants of the liability of Capitol to Lawrence. In appellants' opening brief it was pointed out that at the trial of the cross-claims appellants introduced evidence that Lawrence was negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation and Reconstruction Finance Corporation (Appellants' Op. Br. 42, et seq.). This evidence consisted of the judgment, findings of fact and conclusions of law rendered in favor of Defense Supplies Corporation against Lawrence, Capitol and V. J. McGrew in Action No. 23171, and the uncontradicted testimony of James A. Kenyon, and Lawrence's admissions that it employed watchmen for the Ice Palace. The testimony relied on in appellee's opening brief to refute this evidence (Appellee's Br. 14-27), was not offered and could not have been offered against these appellants. Appellee inconsistently asserts that it cannot be bound by the judgment, findings and conclusions of law rendered in the trial of the complaint of Defense Supplies Corporation because the District Court did not intend to pass on any of the cross-claims then pending (Appellee's Br. 29), while relying on the evidence adduced at that trial and the opinion of this court and the District Court after that trial to establish Capitol's liability to Lawrence. It is clear, therefore, that on undisputed evidence appellants established a complete defense to the claim of Lawrence.

Conclusive as to the disposition of this action is the fact that there is now a final judgment on the merits dismissing Lawrence's claim against Capitol (R. 131, et seq. in 13840). That judgment recites that evidence was introduced and that the cause was submitted to the court for consideration, and paragraph 3 of that judgment reads as follows:

> "3. That the cross-claims of cross-claimant Lawrence Warehouse Company against Capitol Chevrolet Company, Capitol Chevrolet Co. and J.A.K. Co. in action numbered 30473 be and the same are hereby dismissed, and that Capitol Chevrolet Company, Capitol Chevrolet Co. and J.A.K. Co. do have and recover against cross-claimant Lawrence Warehouse Company their several taxable costs and disbursements in said action in the following amounts:
>
> Capitol Chevrolet Company $.....
> Capitol Chevrolet Co. $.....
> J. A. K. Co. $....."

Rule 41(b) of the Federal Rules of Civil Procedure applies to dismissals after the presentation of evidence. That rule states in part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

It was asserted (Appellants Op. Br. 24-25) that this judgment now estops Lawrence to assert any liability of Capitol to Lawrence based on the same claim.

Bernhard v. Bank of America, 19 C. 2d 807, 122 P. 2d 892 (1942).

Appellee's brief attempts to dismiss this point without citation of authority or reference to Rule 41(b) by stating that "counsel's technicality appears wholly frivolous" (Appellee's Br. 40). Apparently it is the position of appellee that notwithstanding the express wording of Rule 41(b), reference may be had to some other documents to show that this judgment is not an adjudication on the merits. Such is not the law.

Black v. Rich, 182 F.2d 706 (D.C. Cir. 1950), (a holding on facts analogous to those in the instant case).

American Nat. Bank & Trust Co. v. United States, 142 F. 2d 571 (D.C. Cir. 1944).

In fact this provision was inserted in Rule 41(b) to eliminate any question of the nature of dismissals and to avoid the complications which formerly resulted from reference to other portions of the record.

9 *Cyclopedia of Federal Procedure* (3rd Ed. 1951), Section 29.18, p. 114.

If the dismissal as to Capitol in Action No. 30473 was not intended to be an adjudication on the merits but a dismissal upon some matter in abatement, the form of the judgment could have been corrected by a motion to the trial court after judgment or by an appeal. Neither of these steps was taken.

Appellants believe that the appeal in Action No. 23171 may be dismissed if it is not reversed. Regardless of what disposition is made of the appeal in Action No. 23171, however, and even assuming that appeal is affirmed, appellants submit that the judgment entered against these

appellants in Action No. 30473 must be reversed with directions to enter judgment for appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

Dated, San Francisco, California,
November 25, 1953.

Respectfully submitted,
HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants
James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

(Appendix Follows.)

Appendix.

Appendix

[Title of District Court and Cause—No. 30473]

NOTICE OF MOTION FOR ORDER PURSUANT TO RULE 54(b).

TO: Lawrence Warehouse Company and W. R. Wallace, Jr., Esq., Maynard Garrison, Esq., John R. Pascoe, Esq., and Messrs. Wallace, Garrison, Norton & Ray:

TAKE NOTICE that on March 3, 1953, at 10:00 o'clock A.M. or as soon thereafter as counsel can be heard, cross-defendants JAMES A. KENYON, F. NORMAN PHELPS and ALICE PHELPS will move the above-styled Court in the United States Courthouse and Post Office Building, Seventh and Mission Streets, San Francisco, California, in the courtroom of the Honorable Louis E. Goodman, for its order *nunc pro tunc* that there is no just reason for delay in entering the Judgment in the above-entitled action dated February 11, 1953, and directing the entry of said Judgment.

In support of said motion said defendants respectfully show that there has been no adjudication of the claims herein of plaintiff, Reconstruction Finance Corporation, against defendant Capitol Chevrolet Co. and against defendant James A. Kenyon.

Said motion will be based on this Notice of Motion, the Memorandum of Points and Authorities attached hereto,

and the records, proceedings and files in the above-entitled action.

Dated: San Francisco, March 2, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER

Attorneys for cross-defendants James A. Kenyon, F. Norman Phelps and Alice Phelps

Counsel for LAWRENCE WAREHOUSE COMPANY, having received and examined a copy of the above Notice of Motion, now agree and consent that the Court may forthwith make its order *nunc pro tunc* that there is no just reason for delay in entering the Judgment dated February 11, 1953, in the above-entitled action and directing the entry of said judgment.

Dated: March 3, 1953.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE
/s/ WALLACE, GARRISON, NORTON & RAY

Attorneys for cross-claimant Lawrence Warehouse Company

MEMORANDUM OF POINTS AND AUTHORITIES.

POINT ONE.

When more than one claim for relief is presented in any action the Court may direct the entry of a final judgment upon one or more but less than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Rule 54(b), Federal Rules of Civil Procedure.

POINT TWO.

Absent such express determination and such express direction, any judgment or other form of decision which adjudicates less than all the claims is not appealable.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950).

POINT THREE.

Such express determination and such express direction may be made *nunc pro tunc.*

Vale v. Bonnett, 191 F. 2d 334 (D.C. Cir. 1951).

No. 13,840

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY,
a corporation,
Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,
Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,
Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,
Appellee.

BRIEF FOR APPELLEE LAWRENCE WAREHOUSE COMPANY.

W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
2200 Shell Building, San Francisco 4, California,
Attorneys for Appellee, Lawrence Warehouse Company.

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United States Court of Appeals

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Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,
Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,
Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,
Appellee.

BRIEF FOR APPELLEE LAWRENCE WAREHOUSE COMPANY.

JURISDICTIONAL STATEMENT.

The original actions below were both civil actions, the amount in controversy in each exceeding $3,000.00 exclusive of interest and costs. Civil Action No. 23171 was commenced by the Defense Supplies Corporation, an agency of the United States in which the Govern-

ment of the United States owned more than one-half of the capital stock, and Civil Action No. 30473 was commenced by the Reconstruction Finance Corporation, an agency of the United States in which the Government of the United States owns more than one-half of the capital stock. Jurisdiction of the District Court was conferred by reason of the amount in controversy and by reason of Sections 1331, 1345 and 1349 of Title 28 of the United States Code.

The present appeal, or appeals, are from a judgment entered against cross-defendants on cross-claims in the above actions, which cross-claims arose out of the same transaction and were ancillary to the complaints of Defense Supplies Corporation and Reconstruction Finance Corporation. This Court has jurisdiction on appeal under Section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE.

This litigation arose from a fire which, on April 9, 1943 (more than ten years ago), destroyed certain tires and tubes belonging to the Defense Supplies Corporation, a governmental agency. Prior to the present appeal (or appeals) the litigation has twice been before the District Court, once before this Court, and once before the Supreme Court of the United States. In appellee's submission the present appeal is utterly devoid of merit, being based almost entirely upon alleged procedural errors of little sub-

stance. The character of the litigation and of this appeal is such as to require a somewhat more extended statement of the case than is usual in an appellee's brief.

A. THE FACTS.

1. As to the occurrences and the litigation.

In the fall of 1942 Defense Supplies Corporation (a federal corporation wholly owned by the United States Government) commenced the so-called "Idle Tire Program," for the collection of surplus tires and tubes from citizens all over the United States. Appellee Lawrence Warehouse Company was appointed government custodian in the California area for this program, with independent agents in various communities for the actual collection and storage of tires. The contract between Defense Supplies and Lawrence stated that Lawrence's responsibility for the care and protection of the tires was limited to the ordinary care of a warehouseman under California law. (Tr. 314 in 11418.) Appellant Capitol Chevrolet Company was the independent agent for the Sacramento area and on October 1, 1942 entered into an "Agency Agreement with Government Custodian" with Lawrence. (Tr. 341 in 11418.) In this agreement Capitol, among other things, agreed "to store and safeguard the storage of such tires and tubes as are received by Agent" and "to indemnify the Principal against loss or damage resulting from

the failure on the part of the Agent to perform any of the duties or obligations above set forth."

Under the program and this agreement Capitol received a great many more tires than anticipated, requiring storage in some eleven separate locations. (Tr. 110 in 11418.) It was determined to consolidate those tires in a single location, and after conferences between representatives of Defense Supplies, Lawrence and Capitol a structure known as the Ice Palace, located in West Sacramento, was selected for the consolidation. (Tr. 111 in 11418.) On March 1, 1943 Defense Supplies and Lawrence entered into a new agreement (in the same form) for the storage of the tires in the Ice Palace (Tr. 310 in 11418), and on the same date Capitol entered into a lease of the building from its owners (Tr. 321 in 11418). Capitol thereupon commenced consolidating the tires in that location. (Tr. 110 in 11418.) At the request of Defense Supplies for a 24-hour watchman service for the Ice Palace, Lawrence contracted with the Burns Detective Agency to furnish such service; the Burns Detective Agency was paid for this service by Lawrence, which in turn was reimbursed by Defense Supplies. (Tr. 285-286 in 11418.)

Defense Supplies had instructed Capitol to permit no one to enter any of the warehouses without authorization from Defense Supplies (Tr. 192, 339 in 11418) and had furnished Capitol a list of persons so authorized (Tr. 340 in 11418). Contrary to these instructions, Capitol permitted one McGrew to enter the

premises (Tr. 185-187 in 11418) and as a result of his use of a metal-cutting torch therein on April 9, 1943, a fire was caused which totally destroyed the building and the tires and tubes therein (Tr. 220-222, 345-349 in 11418).

Thereafter, on February 16, 1944, Defense Supplies brought suit (No. 23171G) against Lawrence, Capitol, McGrew, and the owners of the building, for the loss occasioned by the fire. (Tr. 3 in 11418.) In this action Capitol filed a cross claim against the owners of the building (Tr. 10 in 11418), and Lawrence filed a cross-claim against Capitol and against the owners of the building (Tr. 38 in 11418). The case proceeded to trial on the complaint and on January 9, 1946 the Court ordered judgment for Defense Supplies against Lawrence, Capitol and McGrew, specifically retaining jurisdiction to determine the issues of the various cross claims at a later date. (*Defense Supplies Corporation v. Lawrence Warehouse Co., et al.,* 67 Fed. Supp. 16.) Judgment was also ordered in favor of Clyde W. Henry, one of the owners of the building, the action having been previously dismissed on motion as to the other defendants. Written findings of fact and conclusions of law were filed on April 15, 1946 (Tr. 77 in 11418) and judgment was entered on that date (Tr. 83 in 11418).

An appeal was taken to this Court by both Capitol and Lawrence, and on December 5, 1947 this Court affirmed the judgment. (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 164 Fed. 2d 773.) Sub-

sequently, on motion of Capitol and Lawrence, this Court set aside its judgment of affirmance and the judgment of the District Court, and ordered the case remanded to the District Court with instructions to enter an order dismissing the action. (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 168 Fed. 2d 199.) The ground of the motion and of this Court's decision was that Defense Supplies Corporation had been dissolved prior to the entry of judgment and no substitution had been made and that consequently the District Court lost its jurisdiction. On petition for certiorari the Supreme Court vacated the judgment of this Court and remanded the case with instructions to dismiss the appeal. (*Defense Supplies Corporation v. Lawrence Warehouse Co.,* 336 U.S. 631, 93 L.Ed. 931 (1949).) The Supreme Court in its decision held that the appeal had abated by reason of the dissolution of Defense Supplies, but that the judgment in favor of Defense Supplies was valid when entered. The Supreme Court further stated that Reconstruction Finance Corporation (as successor in interest to Defense Supplies) could, as the real party in interest, bring action on the judgment.

Reconstruction Finance Corporation thereupon, on April 12, 1951, brought suit on the judgment (No. 30473) against Capitol, Lawrence, McGrew and certain successor interests of Capitol (which had been dissolved in the course of the litigation). (Tr. 38 in 13840.) Lawrence filed a cross claim against Capitol

and its successors. (Tr. 54 in 13840.) On November 21, 1951, on motion for summary judgment, a separate judgment was entered in favor of R.F.C. against Capitol, Lawrence and McGrew (Tr. 81 in 13840), and on December 1, 1951 Lawrence paid to Reconstruction Finance Corporation the sum of $58,859.90, the full amount of that judgment (Tr. 96 in 13840).

Subsequently, on February 15, 1952, Lawrence amended its cross-claim to join certain additional successor interests of Capitol (Tr. 113 in 13840) and on March 4, 1952 the District Court entered its order consolidating for trial the cross-claims of Lawrence in both actions (Tr. 18 in 13840). On March 6, 1952 the consolidated trial of Lawrence's cross claims was held. (Tr. 307 in 13840.) On September 12, 1952 the District Court's Order for Judgment was entered, directing judgment in favor of Lawrence against Capitol in No. 23,171, and against James A. Kenyon and Adams Service Co. (two of the successors of Capitol) in No. 30,473 (Tr. 24 in 13840). On January 15, 1953 the Court entered its Order Amending Order for Judgment, ordering that judgment also be given in No. 30,473 in favor of Lawrence against F. Norman Phelps and Alice Phelps, two additional successors of Capitol. (Tr. 30 in 13840.) The Court's consolidated Findings of Fact and Conclusions of Law were filed February 11, 1953 (Tr. 117 in 13840) and a single consolidated judgment was filed on that date and entered on February 12, 1953 (Tr. 131 in 13840). Judgment was for a total amount of $76,269.73 in

favor of Lawrence against Capitol in No. 23,171, and against Kenyon, Adams Service Co., and the Phelps in No. 30,473. The judgment also ordered Lawrence's cross claims dismissed in No. 30,473 as to Capitol and two of its successor interests, Capitol Chevrolet Co. and J.A.K. Co.

A separate notice of appeal (designated in No. 23171) was filed by Capitol on March 10, 1953 (Tr. 33 in 13840), and a further separate notice of appeal (in No. 30,473) was filed by Kenyon, Adams, and the Phelps on the same date (Tr. 179 in 13840). On April 15, 1953 the District Court ordered that a single record on appeal be prepared for the several appeals involved. (Tr. 191 in 13840.)

2. As to appellant Capitol Chevrolet Company and its successors in interest.

In view of certain contentions raised by appellants in this case, we deem it proper and necessary to invite the Court's attention to the following undisputed facts regarding the relationship between appellant Capitol Chevrolet Company and its successors in interest.

Appellant Capitol Chevrolet Company was a California corporation originally incorporated in May, 1936. (Tr. 376 in 13840.) On October 1, 1942, at the time Capitol entered into its agency agreement with Lawrence and from then until its subsequent dissolution, its sole stockholders were appellants James A. Kenyon and Adams Service Co., the stock being

equally divided between these two appellants. (Tr. 107 in 13840.) Adams Service Co. at this time was a Nevada corporation wholly owned by appellants F. Norman Phelps and Alice Phelps. Appellants Phelps at all times dealt with the property of Adams as if it were their own individually.

Capitol was subsequently dissolved, its certificate of election to dissolve being signed on June 1, 1943 and filed with the Secretary of State on June 21, 1943 (Tr. 357 in 13840). On May 31, 1943, Kenyon and Adams assumed and agreed to pay all of the debts, liabilities and obligations of Capitol. (Tr. 162 in 13840.) On December 31, 1943 Capitol's Certificate of Winding Up and Dissolution was executed, which was filed with the Secretary of State on June 5, 1944. (Tr. 358 in 13840.) All of the assets of Capitol were distributed to its stockholders Kenyon and Adams.

Capitol's business was thereafter carried on as a partnership under the same name, the partners being Kenyon and Adams, who contributed to the partnership the assets which they had received from the corporation. (Tr. 160 in 13840.)

On or about April 1, 1946, a new corporation under the name of Capitol Chevrolet Co. was formed which continued the business of the partnership. Its stock was originally issued to Kenyon as trustee of a trust for his daughter, to J.A.K. Co., a Nevada corporation wholly owned by Kenyon, and to F. Norman Phelps and Alice Phelps, the sole stockholders of Adams.

B. THE ISSUES.

This is essentially a very simple case. Appellee Lawrence sought in its cross-claims to be reimbursed by its agent Capitol and the latter's successors in interest for sums which Lawrence as principal might be compelled to pay to a third party on account of its agent's negligence. The only real issues presented to the District Court were whether Lawrence had been held liable on account of its own or on account of its agent Capitol's negligence; and, secondarily, whether Capitol's successors in interest were responsible for its liability.

The simplicity of the case and the real issues presented have been obscured by several factors: first, by the devious course which this protracted litigation has taken; second, by the many changes of business form of Capitol and its owners; and thirdly, by the ingenuity of appellants' counsel in presenting spurious special defenses and relying upon alleged procedural errors of an insubstantial character. For example, Capitol's original answer to the cross-claim in No. 23171 contained a general denial and three special defenses; appellant's present counsel expanded these defenses to eight. (Tr. 10 in 13840.) The answers to the cross-claim filed in No. 30473 contained general denials and ten separate special defenses to each of appellee's two causes of action. (Tr. 98 in 13840.) Six different statutes of limitation were pleaded as special defenses, including periods from six months to five years; the applicability of such scattered de-

fenses seems more than dubious and it is to be noted that appellants have now abandoned them (along with many other contentions) with the exception of one obscure theory involving an alleged "anticipatory breach."

Similarly, counsel for appellants have continually raised new points (largely procedural), urged them with apparent sincerity, and then abandoned them. As an example, we cite the endorsement made by counsel upon the judgment appealed from:

> "Not approved as to form this 29th day of January, 1953, because a separate judgment should be rendered, entered and filed in each of the above-numbered actions and because, further,
>
> So far as we are aware Adams Service Co. was not and is not a party to either action." (Tr. 133 in 13840.)

It is to be noted that both of these contentions have been abandoned, one sub silentio and the other expressly. We believe the comment of the District Court (in its Memorandum of Court upon Signing of Judgment) with respect to this now abandoned objection with regard to appellant Adams is pertinent to the bulk of the errors urged on this appeal.

> "The contention of its attorneys to the contrary at this stage of the proceedings is frivolous." (Tr. 136 in 13840.)

As we have previously stated, the present appeal is almost entirely based upon alleged procedural errors of little substance. These alleged errors stem largely

from the course of the litigation (in two separate suits) as directed by the Supreme Court. Counsel for appellants have endeavored to stretch this bifurcation in every way and have endeavored to divorce and isolate appellants from each other. Separate briefs have been filed on behalf of Capitol and the other appellants, and a continuous effort has been made to indicate a complete separation of interests.

In substance, however, appellants have at all times during this litigation and the occurrences out of which it arose been in complete privity with a complete identity of interest. In substance, furthermore, the two separate suits have constituted a single litigation, arising from the same occurrences, involving the same parties, consolidated for trial as to the cross-claims, and heard and tried on all occasions by the same district judge.

In this single brief filed on behalf of appellee we propose to answer the separate briefs filed by Capitol and by its successor interests. We propose to demonstrate that the judgment against both Capitol and its successor interests, indemnifying Lawrence as principal for a loss suffered by reason of the negligence of its agent Capitol, was entirely proper. We do not propose to unduly extend this brief or burden the Court by a full answer herein to the numerous contentions of appellants. We will dispose of those which appear to have at least some substance; the more insubstantial will be dealt with in the Appendix to this brief.

SUMMARY OF ARGUMENT.

A. The points raised on behalf of appellant Capitol Chevrolet Company.

I. Appellants' "suggestion" that appellant Capitol's appeal was untimely and might be dismissed.

II. Lawrence was entitled to recover from Capitol for loss occasioned by the negligence of Capitol.

III. Lawrence was not bound with respect to its cross-claim against Capitol by the language of the judgment, findings, and conclusions on the complaint of Defense Supplies.

IV. The evidence adduced at the trial of the complaint of Defense Supplies was in evidence for all purposes, including the trial of the cross-claims.

V. Capitol's contention that Lawrence failed to prove loss or damage.

B. The points raised on behalf of appellants James A. Kenyon, Adams Service Co., F. Norman Phelps, and Alice Phelps.

I. Appellee Lawrence Warehouse Company was entitled to recover from appellants Kenyon, Adams and the Phelps as successors to appellant Capitol.

II. The evidence sustains the judgment, findings and conclusions in favor of Lawrence against appellants Kenyon et al.

a. The evidence to sustain the judgment.

b. Appellants Kenyon et al. were in complete privity with Capitol and are bound by the judgment against Capitol.

c. The judgment is binding upon appellants regardless of form.

III. The contentions respecting Lawrence's contributory negligence, etc.

IV. Lawrence's cross-claim was not barred by the Statute of Limitations.

V. Lawrence's loss and damage.

ARGUMENT.

A. THE POINTS RAISED ON BEHALF OF APPELLANT CAPITOL CHEVROLET CO.

I. APPELLANTS' "SUGGESTION" THAT APPELLANT CAPITOL'S APPEAL WAS UNTIMELY AND MIGHT BE DISMISSED.

Counsel for appellants "suggest" that the appeal of appellant Capitol might be dismissed because there was no express determination that there was no just reason for delay in entering judgment under Rule 54(b) of the Federal Rules of Civil Procedure. It is to be noted that the District Court in its order for judgment did make an express direction for entry of the judgment. (Tr. 29 in 13840.)

Surprising though it is to find an appellant "suggesting" that its own appeal might be dismissed, it is even more surprising to find an appellant wholly failing to argue against such a dismissal. It is apparent, however, that counsel for appellants hope to derive some procedural or technical advantage from a dismissal, asserting that a dismissal of the appeal of appellant Capitol would result in a reversal of

the judgment as to the other appellants. This latter contention is wholly fallacious, and will be dealt with later in this brief (pages 49-52). For the moment we only wish to observe that if counsel have any honest doubt as to the propriety of Capitol's appeal or any honest conviction as to the effect of dismissing it, a voluntary dismissal of the appeal is always available to them.

With respect to the merits of counsel's somewhat unusual contention, we would point out that the District Court rendered a single judgment (Tr. 131-133 in 13840), and that the order pursuant to rule 54(b) (Tr. 179 in 13840) refers to that judgment, although entitled by counsel only in No. 30473. Counsel for appellants filed separate notices of appeal for Capitol and its successors shortly after they had had the above order signed, and it is apparent that they either believed the order applied to the judgment as a whole, or that they had no serious hope of reversing the judgment on the merits as to appellant Capitol and hoped to create some further technical ground for urging reversal as to the other appellants.

In view of this obvious procedural pettifogging we at least share counsel's "unresolved doubt" as to the propriety of the appeal, although perhaps on somewhat different grounds. We are forced, however, to consider the points urged on behalf of appellant Capitol, since it is easily demonstrable that the judgment in favor of appellee must be affirmed.

II. LAWRENCE WAS ENTITLED TO RECOVER FROM CAPITOL FOR LOSS OCCASIONED BY THE NEGLIGENCE OF CAPITOL.

Counsel have devoted some thirty pages in the brief filed on behalf of appellant Capitol (p. 20-50 of brief for Capitol) to the contention that the evidence precluded recovery by Lawrence against Capitol. This argument includes a somewhat inaccurate and incomplete statement of the law of indemnity (p. 20-24), a contention that Capitol's negligence was known to and directed by Lawrence (p. 24-42), and a contention that Lawrence was independently negligent (p. 42-50). These contentions would seem to be foreclosed by the findings of fact of the District Court and the clear evidence in support thereof, but since these are the only arguments advanced by counsel in either brief which appear to be upon the merits (as distinguished from procedural hypertechnicalities), they must be here considered.

Appellee Lawrence has at all times contended, and the District Court found, that Lawrence was held liable to Defense Supplies (and its successor Reconstruction Finance) solely upon a basis of respondeat superior on account of the negligence of its agent, appellant Capitol. It is to be noted that this Court (in its subsequently vacated decision) so stated:

> "While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency agreement fully support that conclusion." (164 Fed. (2d) 773 at 776.)

Since Lawrence's liability was based on imputed negligence of its agent Capitol, Lawrence has at all times contended, and the District Court held, that Lawrence was entitled to indemnity from Capitol. (Appellants Kenyon and Adams expressly assumed Capitol's liabilities upon its dissolution, and no longer contend (except upon procedural grounds) that they are not liable if Capitol is liable. The Phelps concededly are responsible for the liability of Adams as their corporate alter ego.)

There can be no doubt that Lawrence was entitled to recover from Capitol for loss resulting from the negligence of Capitol as its agent. Independently of the written agency agreement of October 1, 1942 (Tr. 341 in 11418), the rule of law is undisputed that a principal is entitled to indemnity from its agent for loss resulting from the principal's liability to a third person on account of the negligence of its agent.

Bradley v. Rosenthal, 154 Cal. 420, 423, 97 Pac. 875 (1908);

Johnston v. City of San Fernando, 35 Cal. App. (2d) 244, 246, 95 Pac. (2d) 147 (1939);

United Pacific Ins. Co. v. Ohio Casualty Ins. Co., 172 Fed. (2d) 836 (U.S.C.A. 9th, 1949) (at p. 840, footnote 5);

42 *Corpus Juris Secundum,* 596-8;

See Note 38 A.L.R. 566.

This undisputed rule of law is reinforced in this case by the terms of the agency agreement of October

1, 1942, in which Capitol agreed (paragraph 8, Tr. 343 in 11418):

> "To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth."

Among the duties or obligations of Capitol referred to was its agreement under paragraph 3 of the contract: "To store and safeguard the storage of such tires and tubes as are received by Agent". (Tr. 342 in 11418.)

Counsel for appellants do not apparently contradict this rule of law or the above facts. They do, however, assert, first, that Lawrence knew of and directed Capitol's negligence, and second, that Lawrence was independently negligent. Both of these contentions are contrary to the District Court's findings, and cannot be here considered unless there is a total lack of evidence to support the findings. It is elementary and, we think, not disputed even by counsel, that a District Court's findings of fact, made upon conflicting evidence or supported by evidence, may not be reversed or disregarded by this Court.

Counsel devote eighteen pages (p. 24-42 of Brief for Capitol) to a purported review of some of the evidence in an effort to demonstrate that the District Court's findings are "clearly erroneous". Nowhere in this discursive argument do counsel state specifically which finding they deem unsupported by the evidence but attack a large group generally upon that ground.

The entire argument is apparently based upon the false premise that this Court must disregard the findings and reexamine all of the evidence to see if contrary findings might have been made. Such, we submit, is not the function or the duty of this Court upon this appeal.

E. R. Squibb & Sons v. Mallinckrodt Chemical Works, 69 Fed. (2d) 685 (C.C.A. 8th, 1934); affd. 293 U.S. 190; Cert. denied 295 U.S. 759;

National Surety Co. v. Globe Grain & Milling Co., 256 Fed. 601 (C.C.A. 9th, 1919);

Remington Rand, Inc. v. Societe Internationale, 188 Fed. (2d) 1011 (C.A., D.C., 1951); cert. denied 342 U.S. 832, 96 L.Ed. 630.

Counsel in their Specification of Errors (p. 12 Brief for Capitol) charge that the judgment, findings of fact Nos. V, VI, VII, XIII, XVII, XVIII, XIX, XX, XXII and XXIII, and conclusions of law Nos. I and II are unsupported by the evidence and are "clearly erroneous". In their argument, however, counsel never point out specifically which finding is deemed objectionable, or why, but are content to make a general argument upon portions of the evidence. This general argument has already been thrice made and thrice rejected, first in the District Court upon the original trial (67 Fed Supp 16), next in this Court upon the original appeal (164 Fed (2d) 773), and thirdly in the Court below (Tr. p. 24-30 in 13840). It is here re-asserted to support a contention that Lawrence knew of and directed Capitol's negli-

gence, but in its essence it amounts to an argument that Capitol (the actual custodian of the tires which permitted McGrew to enter and use the welding torch) had neither possession nor the responsibility for the property stored in its warehouse. In answer we take the liberty of quoting from the brief of Defense Supplies on the original appeal and adopting the language as our own:

> "Capitol's position is a unique one. It had agreed to store and safeguard the goods, and now seeks to avoid liability on the ground that it was not storing the goods at all because it had no control over the premises. One is tempted to ask, 'What was Capitol being paid for?' "

This Court on the original appeal rejected Capitol's argument in its entirety.

> "We turn now to special circumstances. One of them relates to the fact that the Corporation approved the selection of the Ice Palace as a place of storage. We may assume that the approval would relieve the warehousemen had some known defect in the premises been the cause of the loss. But such is not thought to be the situation here. The loss resulted from the use of the acetylene torch; and the record is devoid of intimation that the Corporation approved its use, or had knowledge of the failure of the warehouseman to take reasonable precautions to safeguard the property from hazards that might naturally be expected to flow from the use of such an instrumenality.
>
> Another circumstance relates to the status of Kissell, the guard on duty while McGrew was at

work. This man was an employee of the Burns Detective Agency. In the course of the trial it was stipulated that the Corporation requested the establishment of a twenty-four hour guard service, and that in compliance with the request Lawrence, with the Corporation's assent, employed the Burns Detective Agency, and paid them; that the corporation reimbursed Lawrence. On the strength of this arrangement Capitol appears to argue that the premises were not in its custody but were in the joint custodianship of Lawrence and the Corporation. It attempts to saddle the responsibility elsewhere on the further ground that Kissell, who was not its employee, saw McGrew working with the torch and did nothing about it. There are several answers to this line of argument. To begin with, the disclaimer of custodianship is at loggerheads with Capitol's conduct and with the terms of its written contract with Lawrence. Again, the stipulated facts are insufficient to support an inference that the Burns Agency or the guard was an employee of the Corporation. Moreover, it was Capitol, not the guard, who permitted McGrew to enter and pursue his work in the building. Kissell's presence did not preclude vigilance on Capitol's part or, indeed, render its exercise any the less imperative since Kissell acted in the matter under Capitol's directions and had no apparent reason to suppose that McGrew's use of the torch was unauthorized."

164 Fed. (2d) 773 at 776-7.

This Court's statement is equally applicable when considered on behalf of Lawrence here. A close and studious examination of counsel's argument (p. 24-42

of Brief for Capitol) discloses that they are apparently arguing that Capitol's only negligence was in using the Ice Palace as a place of storage and that this was known to and directed by Lawrence. Certainly it was known to Lawrence, but it was also known to Defense Supplies and hence could not have been the basis for the judgment for Defense Supplies. In truth, the negligence was the admission of McGrew, unknown both to Defense Supplies and to Lawrence. This Court already so indicated on the first appeal, and the District Court in its present findings so found.

"V.

"That on or about April 9, 1943, while tires and tubes belonging to plaintiff Defense Supplies Corporation, were so stored in said Ice Palace, Capitol Chevrolet Company negligently consented to and approved the entry of one V. J. McGrew into said 'Ice Palace' and its attached engine and boiler room without ascertaining his intentions. That at said time and place said cross-defendant Capitol Chevrolet Company negligently failed to maintain adequate safeguards against fire. That said V. J. McGrew employed a torch in said engine and boiler room and in consequence of the negligent use thereof and in consequence of the negligence of cross-defendant, Capitol Chevrolet Company, in failing to ascertain his intentions and prevent the use of said torch in view of the hazard involved and the lack of fire fighting equipment, and its negligence in failing to maintain adequate safeguards against fire, a fire broke out and said 'Ice Palace' and said tires and tubes were wholly destroyed and consumed by said fire." (Tr. 119-120 in 13840.)

There is certainly no word of evidence in the record that Lawrence knew of or directed the entry of McGrew. The finding that Capitol permitted the entry is amply supported by the evidence. Gordon Kenyon, the assistant manager of Capitol, flatly admitted that he gave permission for the entry. (Tr. 186-7 in 11418.) Counsel now argue that this testimony of Capitol's own employee must be disregarded on appeal because "he was in error". (p. 38 of brief for Capitol.) This novel argument is not only ingenious but ingenuous, and requires no consideration. Additionally the watchman Kissell testified flatly that he permitted McGrew in because of a written order from Capitol, which order was later destroyed in the fire.

"Q. Do you recall on April 9, 1943, seeing some workmen working in the engine room of the Ice Palace?

A. Yes.

Q. Did you permit them to go in there?

A. They had a permit, I did not do the permitting; that is, there was an order left there for them to go to work. I did not stop them. I allowed them to go to work that morning.

Q. What time did you go on duty?

A. At eight o'clock.

Q. Were they working when you came on duty?

A. Yes, they were.

Q. You say there was an order. What do you mean by that?

A. There was an order came from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room.

Q. Did that appear in your book of instructions, or whatever you kept there?

A. That was our orders, not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company." (Tr. 280 in 11418.)

"Q. As far as you know, there were some instructions given but these instructions were not given to you?

A. They were not given to me personally, no.

Q. You did not see any written instructions of the Capitol Chevrolet Company?

A. Yes, I did.

Q. Did you yourself?

A. Yes.

Q. Have you got them?

A. No, I have not. They burned up in the fire.

Q. Burned up in the fire?

A. Yes.

Q. Was that in the form of a card?

A. Yes, a card, that there would be men there in order to take that steel our of the engine room. That was all there was to it.

Q. That is your recollection at this time. Isn't it true that the card stated that Mr. Sanchez was authorized to enter the Ice Palace for the purpose of removing some pipe and equipment?

A. Well, it was not the Ice Palace; it was the engine room. There was nothing said about entering the inside of the Ice Palace on the card.

Q. You were sure it said something about the engine room, that the card said that?

A. Yes.

Q. When did you see that card?

A. I think it was the day before the fire.
Q. The day before the fire.
A. Yes." (Tr. 287 in 11418.)

We submit that the finding of the District Court that Capitol negligently permitted McGrew to enter the premises and that that negligence caused the fire is amply supported by the evidence. We submit further that the findings of the District Court that Lawrence neither knew of nor directed this entry are undisputed and that appellants' argument is without validity.

The second (and last) argument made by counsel upon the merits is that Lawrence was independently and actively negligent. (p. 42-50 of brief for Capitol.) Here again the findings, supported by the evidence, are to the contrary, and the entire argument has in effect been answered above.

Counsel suggest that the finding (finding XIII, Tr. 125 in 13840) is not express; we would point out that it is definite and express as to the issue tendered by appellant Capitol in its first amended answer to cross-claim. (Tr. 14 in 13840.) The District Court found that Lawrence was not negligent. Counsel seek to find negligence on the part of Lawrence on a theory that because of the employment of independent guards for the Ice Palace, Capitol no longer had a duty to safeguard the tires and had relinquished that duty to Lawrence. This argument is fully disposed of above. It may be further answered by pointing out again that Capitol was actually in possession of and operating

the warehouse. The instructions as to who might enter were given in writing by Defense Supplies to Capitol. (Tr. 192 in 11418.) Gordon Kenyon, assistant manager of Capitol testified:

> "Q. After the Ice Palace was leased was any person other than the ones mentioned here authorized to enter any of the buildings by the Defense Supplies Corporation?
>
> A. Not other than the list that we had agreed on.
>
> Q. You had agreed upon a list with someone from the Defense Supplies Corporation?
>
> A. Mr. Baxter and Mr. Anderson.
>
> Q. Mr. Baxter was the field representative for the Defense Supplies Corporation, and your contact with the Defense Supplies Corporation in obtaining the Ice Palace, the leasing of it?
>
> A. Yes." (Tr. 193 in 11418.)

The watchman refused to admit any one in to remove the equipment (letter of James Kenyon, Tr. 346 in 11418) without authority. Capitol then gave written instructions to allow the men to enter to remove the equipment. (Tr. 280, 286-7 in 11418.)

To assert, as counsel now do, that Lawrence was negligent because of the presence of independent guards, hired at the request of Defense Supplies, is to ask this Court to disregard the findings and the evidence supporting them. It is quite clear that the guards were independent contractors, requested by Defense Supplies and paid for by Defense Supplies through Lawrence. It is also abundantly clear that Capitol never relinquished its duties as actual cus-

todian and cannot now assert to the contrary. The finding is clear that Lawrence was not negligent and that finding is supported by the evidence.

It is submitted that on the evidence Lawrence was entitled to be indemnified by its agent Capitol for loss occasioned by the latter's negligence. The District Court so found. Appellants' attack upon the findings cannot be sustained, and it is submitted that it is not within the province of this Court to weigh the evidence and redetermine the questions of negligence and contributory negligence, both of which are questions of fact.

III. LAWRENCE WAS NOT BOUND WITH RESPECT TO ITS CROSS-CLAIM AGAINST CAPITOL BY THE LANGUAGE OF THE JUDGMENT, FINDINGS, AND CONCLUSIONS ON THE COMPLAINT OF DEFENSE SUPPLIES.

We pass now from the only contentions of appellants upon the merits of the action, and turn to a consideration of the multitudinous charges of procedural error made by counsel in the separate briefs which they have filed on behalf of appellant Capitol and the other appellants. As we have stated before, none of these points are of substantial merit and many of them seem even frivolous. We will endeavor to dispose of them with brevity herein, including a somewhat more detailed discussion of some of them in the appendix to this brief should this Court desire a fuller answer than we feel proper in this brief itself.

The first of these points is urged in the brief filed for appellant Capitol at pages 50 to 57 and repeated

in the brief filed for the other appellants at pages 44 to 48. Briefly stated, this point is that, by reason of the language used in the judgment (Tr. 83-4 in 11418) and in the findings of fact and conclusions of law (Tr. 77-82 in 11418) in favor of Defense Supplies upon its complaint, Lawrence was bound (upon some theory of res judicata or estoppel by judgment) from denying its own negligence in presenting its cross-claim against Capitol. This point and the next point urged (pages 57 to 66 of Brief for Capitol), to the effect that the District Court could not, upon the trial of the cross-claim, consider evidence adduced at the trial of the complaint, are based upon a fundamental misconception or misunderstanding of present Federal procedure.

The complaint of Defense Supplies was against Capitol, Lawrence, McGrew and the owners of the building (Tr. 3 in 11418), and both Lawrence and Capitol filed cross-claims, that of Lawrence being against Capitol and the owners of the building (Tr. 38 in 11418) and that of Capitol being against the owners of the building alone. (Tr. 10 in 11418.) The case proceeded to trial upon the complaint and the District Court, in its Opinion and Order for Judgment, at the specific request of all counsel, ordered:

> "The court will retain jurisdiction to determine the issues of the cross-actions, if the parties therein concerned determine to pursue the same." (Tr. 75 in 11418.)

The District Court's power to enter such an order was specifically provided under Rule 54(b) of the

Federal Rules of Civil Procedure, which read as follows at the time (prior to the 1948 amendment thereof):

> "When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

There can be no doubt but that the District Court, in entering judgment in favor of Defense Supplies, never intended to pass upon the merits of any of the cross-claims then pending in the action. There was no attempt in the judgment, findings, conclusions, order for judgment and opinion to make any disposition whatsoever of the various pending cross-claims, which were expressly reserved for later determination. Counsel now assert, however, that the District Court, having expressly reserved the issues of the cross-claims for later determination, was foreclosed from determining those issues on the evidence before it because of the wording of its judgment and findings in

favor of Defense Supplies. Counsel assert that the evidence was merged in the judgment and that the wording of the judgment conclusively proves active negligence on the part of Lawrence.

This surprising assertion was summarily rejected by the District Court. (Findings Nos. XV and XVI, Tr. 125-6 in 13840.) Counsel's contention is stated at length in their brief for Capitol (pages 50-57) and is compounded of elements of res judicata, estoppel by judgment and judicial merger. It proceeds upon the erroneous assumption that Lawrence's right to indemnity from its agent Capitol is based upon and supported only by the judgment in favor of Defense Supplies. In fact, Lawrence's claim to indemnity was not expressed as a suit upon a judgment; it was set out in a cross-claim, on file and at issue long before the entry of the judgment for Defense Supplies.

Counsel repeatedly refer to the hearing on the complaint of Defense Supplies as the former trial or the former action in an effort to validate their arguments and make applicable the authorities cited. We repeat that this was a single action with cross-claims at issue at the time of the former hearing, and with an express reservation of jurisdiction for the trial of those cross-claims.

The judgment, findings of fact and conclusions of law in favor of Lawrence against its indemnitor Capitol rest upon and are supported by the evidence, not upon the judgment in favor of Defense Supplies. The

judgment in favor of Lawrence against the other appellants who expressly assumed Capitol's liabilities, rests upon and is supported by the judgment in favor of Lawrence against Capitol, and not upon the judgment in favor of Defense Supplies. Appellants' entire involved argument based upon the alleged effect of the judgment in favor of Defense Supplies is simply not relevant here. Additionally, their argument is fallacious and contrary to law, but we deem it unnecessary to extend this brief by answering it in detail here. Should this Court consider it to have any relevancy whatsoever, a more detailed consideration and disposition of it will be found in the appendix to this brief (pages i-ix).

IV. THE EVIDENCE ADDUCED AT THE TRIAL OF THE COMPLAINT OF DEFENSE SUPPLIES WAS IN EVIDENCE FOR ALL PURPOSES, INCLUDING THE TRIAL OF THE CROSS-CLAIMS.

Appellant Capitol urges (pages 57 to 66 of Brief for Capitol) that it was error for the District Court to consider on the trial of the cross-claim the evidence already introduced by Defense Supplies to sustain the latter's complaint. This point is wholly and utterly without merit, unsupported by any applicable authority, and entirely at variance with the purpose and scope of the present Federal Rules of Civil Procedure. The only plausibility of the argument, and the only applicability of the authorities cited to support it, is based upon the misconception that the previous hearing upon the complaint of Defense Supplies constituted a *"former trial"*.

Factually and legally that hearing did not constitute a former trial, but was a phase of the same action. The cross-claims were at issue at that time, and jurisdiction was specifically reserved to determine them at a later time. Due to the intervening appellate proceedings the time between the hearings was extended in this case, but legally and in fact the situation is no different than if the parties had proceeded to a determination of the cross-claims on the succeeding day. Under present Federal procedure evidence offered in a consolidated case or where there are cross-claims or third party defendants is in evidence for all purposes.

Rules 13(g), 14, 42(a), 43(a) Federal Rules of Civil Procedure;

Jones v. Waterman S.S. Corp., 155 Fed. (2d) 992, 997 (C.C.A. 3d, 1946);

Metzger v. Breeze Corporations, 37 Fed. Supp. 693, 695 (D.C., N.J., 1941);

See

McClure v. Donovan, 33 Cal. (2d) 717, 722 (1949).

To hold otherwise is to defeat the clear purpose of the Federal Rules of Civil Procedure to avoid multiplicity of suits and unnecessary duplication of testimony.

Appellants' contention was summed up by the learned district judge (Tr. 317-8 in 13840):

> "What you are saying amounts to this: That if it were necessary to determine the rights and liabilities of the parties on these cross-actions,

> that the court would have to hear all this evidence over again and have it re-introduced, and all the documents that were introduced at the other hearings."

It seems clear that such repetition is wholly unnecessary under modern Federal practice, where the cross-claims are asserted in the identical action and are reserved for later determination by the same Court.

The fact that this testimony was in evidence would not preclude any of the parties from introducing further evidence on the trial of the cross-claims, or from recalling witnesses for further examination, or even from objecting to the applicability of specific items of evidence. It does, however, preclude a carte blanche exclusion of all of the evidence, which was what was sought by counsel for appellants here.

It may be pointed out in passing that the question of possible applicability of portions of the evidence was recognized early in the hearing on the complaint of Defense Supplies, when Mr. Wallace, counsel for Lawrence, stated:

> "I think counsel for the plaintiff did not mention in his opening statement that aside from the action of Defense Supplies Corporation against all of the defendants, there is also on file a cross-complaint in which Lawrence Warehouse Company is cross-claimant against Capitol Chevrolet Company, Clyde W. Henry, and Constantine Parella, so that evidence introduced as against one defendant would not necessarily be evidence as against the others." (Tr. 106 in 11418.)

Counsel did not at the hearing on the cross-claim move to strike any specific testimony on the ground of its applicability; they simply moved to exclude the evidence in its entirety. It is submitted that the authorities cited (none of which involve cross-claims but are concerned with evidence in a former trial or action) have no application here and do not support counsel's position. Under the circumstances we feel the cases need not be dealt with in detail.

Counsel assert that appellant Capitol has been deprived of its day in Court. This is apparently based upon some involved theory that Capitol has been estopped to deny its liability over to Lawrence because of the judgment in favor of Defense Supplies. This again is a misconception. At the hearing on the cross-claim against Capitol, Lawrence, justifiably feeling that the evidence previously introduced was sufficient to establish Capitol's liability to Lawrence, relied upon that evidence and found it unnecessary to introduce further evidence on those questions of fact. This did not preclude Capitol from introducing any evidence it saw fit; it could have called or recalled witnesses and added any proper testimony to the record that counsel felt necessary. To assert, in view of the extended course of this litigation, that Capitol has been deprived of its day in Court is to reach the heights of frivolity.

It is additionally urged (pages 64-66 of brief for Capitol) that this evidence was not admissible to show a "true meaning" of the judgment, findings and con-

clusions in favor of Defense Supplies. This contention is apparently based upon some theory of "integration" of the evidence into the judgment in favor of Defense Supplies. It is wholly fallacious here. The judgment here appealed from by appellant Capitol does not rest solely upon that prior judgment; it rests upon the evidence. That evidence was admitted in an action containing both the claim of Defense Supplies and the cross-claims of the defendants. We are unable to see how that evidence is "integrated" into a judgment upon the claim of Defense Supplies alone, when jurisdiction was expressly reserved to try the cross-claims at a later time.

We submit that counsel's entire point with regard to the consideration of the evidence taken earlier was fully answered in the order for judgment of the District Court herein:

> "The contention of Capitol, that the evidence introduced by Defense Supplies Corporation upon the trial of its complaint, cannot be considered in determining the cross-complaint, is without merit, inasmuch as *the trial of the cross-complaint is but another phase of the same action.* Capitol's contention is not supported by the authorities cited." (Emphasis added.) (Tr. 29 in 13840.)

V. CAPITOL'S CONTENTION THAT LAWRENCE FAILED TO PROVE LOSS OR DAMAGE.

The last point urged in the brief filed by counsel on behalf of appellant Capitol is found, upon examination, to be perhaps the most outrageous of the

red herrings drawn into this appeal to avoid the payment of an honest obligation. It is here urged that Lawrence failed to prove *as against Capitol* that it had suffered any loss or damage because (1) the evidence of payment was restricted to Action No. 30473, and (2) because there was no proof in No. 23171 that the judgment in favor of Reconstruction Finance Corporation was based upon the judgment in No. 23171 in favor of Defense Supplies.

These hypertechnical contentions, never raised in the District Court, must be considered with certain basic facts in mind. The charge of error is made by appellant Capitol with regard to an alleged deficiency of proof in one of two cases consolidated for trial, both of which cases arose from the same transaction. Appellant Capitol was a defendant and cross-defendant in both actions, represented by the same counsel. As to one of the two alleged deficiencies of proof (as to payment by Lawrence to R. F. C.), counsel for Capitol stipulated to such payment at least in the second of the two consolidated actions. As to the second of the alleged deficiencies of proof (that the R. F. C. judgment was based upon the Defense Supplies judgment), counsel for Capitol admitted that fact on behalf of Capitol in their pleadings. Furthermore, both of those judgments ran against Capitol as well as against Lawrence.

In the face of these indisputable facts counsel for appellants have the temerity to assert that the record in the consolidated action is defective because Lawrence failed to offer proof of loss or damage in one

of the two numbered actions. They further suggest that there is no rule of law apparent to them whereby the facts might be "judicially noticed".

As to the first asserted deficiency of proof, counsel cite (pages 66-77 of Brief for Capitol) a colloquy between counsel. It will be noted from this that senior counsel for Capitol first stipulated as to payment by Lawrence, and that junior counsel for Capitol also so stipulated, but then stated that he "would object to its admission in the first case as irrelevant". It is now insisted by counsel that it was not only relevant, but was absolutely essential. It is difficult to conceive of a clearer case of invited error.

In any event, there is ample authority that judicial notice could be taken of the facts as to which counsel assert there is failure of proof. Such facts appear without conflict in the record of the so-called second of the two consolidated cases. As to the fact of payment by Lawrence, there is not only the stipulation of counsel (Tr. 343 in 13840), but there is also the Notice of Payment of Judgment (Tr. 96-97 in 13840) and Assignment of Judgment. (Tr. 95-96 in 13840.) The fact that the judgment in favor of R. F. C. against Capitol and Lawrence was based upon that in favor of Defense Supplies against the same parties was pleaded in the complaint of R. F. C. (paragraphs VII and XII, Tr. 40-42 in 13840) and in Lawrence's cross-claim (paragraphs IV and VII, Tr. 56-59 in 13840) and was admitted by Capitol. (Paragraphs IV and VII, Tr. 67-68 in 13840.)

There are numerous cases both under California and Federal practice which permit the Court to take judicial notice of the facts here asserted to be unproven.

Schomer v. R. L. Craig Co., 137 Cal. App. 620, 627, 31 P. (2d) 396 (1934);

Christiana v. Rose, 100 Cal. App. (2d) 46, 52, 222 P. (2d) 891 (1950);

A. G. Reeves Steel Const. Co. v. Weiss, 119 Fed. (2d) 472 (C.C.A. 6th, 1941); cert. denied 314 U.S. 677, 86 L.Ed. 541;

Fletcher v. Evening Star Newspaper Co., 133 Fed. (2d) 395 (C.A., D.C., 1942);

Suren v. Oceanic S.S. Co., 85 Fed. (2d) 324 (C.C.A. 9th, 1936).

The rule is fully stated in the *Reeves* case (supra), at page 474:

> "The general rule is that a court will not go outside the record before it to take notice of the proceedings in another case even between the same parties and in the same court, unless such proceedings are put in evidence. National Surety Company v. United States, 9 Cir., 29 F. 2d 92; Paridy v. Caterpillar Tractor Company, 7 Cir., 48 F. 2d 166. The dictates of common sense and the demands of justice provide an exception to this rule that in order to reach a just result and bring an end to litigation, courts will make use of established and uncontroverted facts not formally of record in the pending litigation where such facts may be ascertained from an examination of the facts and pleadings in former cases in

> the appellate court between at least one of the parties and others relating to the same subject matter. 'The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it.' Dimmick v. Tompkins, 194 U.S. 540, 548, 24 S. Ct. 780, 782, 48 L. Ed. 1110."

And the District Court may take judicial notice under similar circumstances:

> "The controlling question raised on this appeal is whether a lower court, on a motion made for summary judgment, and in determining that there is no genuine issue as to any material fact, can take judicial notice of its own records in concluding the issue thus raised."
>
> "We take this to be too well settled to be seriously questioned. * * * Citing cases. * * *
>
> "Not only that, but it is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties."
>
> *Fletcher v. Evening Star Newspaper Co.,* supra.

Counsel also suggest that payment by Lawrence to R. F. C. was a "voluntary act" not connected with the judgment in favor of Defense Supplies, because the judgment in favor of R. F. C. was not "final" within the meaning of Rule 54(b). No authority is cited for this remarkable proposition that an indemnitee may not recover from his indemnitor sums which the indemnitee has paid on a judgment against which he

was indemnified, solely because the judgment was not "final" for purposes of appeal. It may be noted here that the indemnitor (Capitol) was also a judgment debtor under that judgment and that counsel for Capitol approved it as to form. (Tr. 81-83 in 13840.)

The final artful suggestion on behalf of Capitol is that "*a* judgment" was filed dismissing Lawrence's cross-claim against Capitol in No. 30473 and that consequently Lawrence is estopped to assert Capitol's liability. The judgment so referred to is the consolidated judgment here appealed from (Tr. 131-134 in 13840), and the basis for the dismissal of one of Lawrence's two cross-claims is fully explained in the order for judgment (Tr. 30 in 13840) and in the conclusions of law. (No. III, Tr. 130 in 13840.) This ultimate refinement of counsel's technicality appears wholly frivolous.

B. THE POINTS RAISED ON BEHALF OF APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS, AND ALICE PHELPS.

I. APPELLEE LAWRENCE WAREHOUSE COMPANY WAS ENTITLED TO RECOVER FROM APPELLANTS KENYON, ADAMS AND THE PHELPS AS SUCCESSORS TO APPELLANT CAPITOL.

We pass now from the contentions raised on behalf of appellant Capitol to those raised in the separate brief filed on behalf of the other appellants. With respect to the first point raised we find ourselves in full agreement with counsel for appellants—if the judgment in favor of Lawrence against Capitol is

reversed on the merits, the judgment against the latter's successors (who assumed its liabilities) cannot stand.

The converse of this proposition is also true. If Lawrence was entitled to recover from Capitol, it was also entitled to recover from Capitol's successors in interest who assumed its liabilities. Counsel concede (as they must upon the admitted facts) that appellants Kenyon and Adams expressly assumed in writing the obligations of Capitol upon its dissolution, and that appellants Phelps are liable upon the assumption of Adams since it constituted their corporate alter ego. (Page 7 of Brief for Kenyon et al.)

It is to be noted that there is not one point raised in the brief filed on behalf of these appellants which goes to the substantive merits of their liability. It is now conceded that they are liable if Capitol is liable, but it is argued at length that alleged technical procedural errors should be held to deprive Lawrence of its otherwise just judgment. These alleged errors appear to be of an insubstantial character and must be considered in the light of the admitted facts and circumstances.

II. THE EVIDENCE SUSTAINS THE JUDGMENT, FINDINGS AND CONCLUSIONS IN FAVOR OF LAWRENCE AGAINST APPELLANTS KENYON ET AL.

Counsel devote the major portion of the brief filed on behalf of appellants Kenyon et al. (pages 16 to 42 thereof) to a lengthy and somewhat abstruse argu-

ment to the effect that no evidence was offered to show their liability to Lawrence. This argument is complicated and somewhat disorganized and consequently is difficult to deal with in an orderly and concise manner. It appears, however, from counsel's summary at the end of this section of their brief that they are relying upon three separate propositions:

> "From the foregoing analysis arise three independent and separate reasons why the judgment against these appellants must be reversed:
>
> 1. No evidence was offered or admitted against appellants to show a liability of Capitol to Lawrence.
>
> 2. Under the settled law of this court and the decisions of the State of California, appellants cannot be bound by the judgment or evidence against Capitol.
>
> 3. Under the decisions of the Supreme Court of the United States the judgment against Capitol, not being final, cannot be *res judicata* against appellants." (p. 41-42 of Brief for Kenyon et al.)

Assuming these to be the points raised by counsel, we will deal with them in the order stated.

a. The evidence to sustain the judgment.

Apparently pages 16 to 25 and pages 38 to 41 of the brief filed on behalf of appellants Kenyon et al. are devoted to counsel's first stated point that there was no evidence to sustain the judgment for Lawrence against these appellants.

In considering this point, it must again be borne in mind that these appellants expressly assumed the liabilities of Capitol; it was so admitted in their answers to interrogatories and in the depositions (all in evidence) and is specifically conceded in their brief. The District Court, in its order for judgment indicated clearly that since judgment was being ordered against Capitol after a consolidated trial, that judgment was binding upon those who had assumed Capitol's liabilities:

> "James A. Kenyon and Adams Service Co. having actively participated in the defense of Capitol Chevrolet Company in No. 23171, the judgment in that action is res judicata as to them. Inasmuch as they assumed the liabilities of Capitol Chevrolet Company upon its dissolution, they are liable for the amount of the judgment against Capitol." (Tr. 29 in 13840.)

Appellants now assert, first, that the judgment against Capitol was never offered in evidence against the other appellants and that the Court could not take judicial notice of it, and second that reliance upon it was never pleaded. Just how one could plead or offer in evidence in a consolidated action a judgment not yet rendered in that action is not clear to us. Appellants' assumption of Capitol's liabilities, including that to Lawrence, was fully set out in the pleadings (paragraphs VI and VII of cross-claim, Tr. 57-59 in 13840), and the effect upon appellants of a judgment against Capitol was fully discussed in the briefs in the District Court. Counsel now assert, without

citation of authority, that appellants Kenyon et al. have been deprived of their day in court because of failure to plead formally the effect of a judgment in favor of Lawrence against Capitol, a judgment not yet rendered but sought in the consolidated action. Moreover, this judgment, establishing Capitol's liability (among those expressly assumed by these appellants), would clearly be binding upon them and could not have been collaterally attacked. It is submitted that counsel's contention is specious.

The only authorities cited in this portion of the brief filed on behalf of appellants Kenyon et al. are purportedly directed to the contention that the Court could not take judicial notice as against these appellants of the judgment given simultaneously in a single document in a consolidated action against Capitol. *All* of the cases cited (at pages 19 to 23 of Brief for Kenyon et al.) involve former judgments or judgments at a former trial, and are simply not applicable. We have heretofore cited authorities (page 38 of this brief) directly contrary to those cited for appellants, but assuming the authority of the cases cited by appellants, they are still inapplicable here. Assuming that a judgment in a *former* action or at a *former* trial must be pleaded or offered in evidence at a later trial in order for the Court to take judicial notice of it for purposes of estoppel or res judicata, the situation here is quite different. Here the judgment was given by the District Court in the *same* document at the *same* time after a consolidated trial. Counsel

would have the District Court close its eyes to its own simultaneous and indivisible action. We submit that the authorities cited simply do not require such an anomalous result.

b. Appellants Kenyon et al. were in complete privity with Capitol and are bound by the judgment against Capitol.

In considering the next point urged by counsel (pages 25 to 35 of Brief for Kenyon et al.) we find ourselves in the realm of fantasy. It is here seriously urged that these appellants are not bound by the judgment against Capitol because they were not in privity with Capitol nor did they participate in Capitol's defense. Before considering the authorities cited, we wish to restate the undisputed facts as to the relationship of these parties.

At all times germane to this action (from October 1, 1942 until its dissolution) Capitol's sole and equal stockholders were appellants James A. Kenyon and Adams Service Co. (Tr. 107, 158 in 13840.) It is conceded by appellants that Adams Service Co. was the corporate alter ego of appellants F. Norman Phelps and Alice Phelps. (p. 7 of Brief for Appellants Kenyon et al.) The fire which destroyed the tires of Defense Supplies occurred on April 9, 1943. (Tr. 79 in 11418.) Capitol's Certificate of Election to Dissolve was signed on June 1, 1943 and filed with the Secretary of State on June 21, 1943. (Tr. 357 in 13840.) On May 31, 1943, Kenyon and Adams as sole stockholders of Capitol, in consenting to the dissolution, expressly agreed to assume and pay all of the debts,

liabilities and obligations of Capitol upon the transfer to them of its assets. (Tr. 162 in 13840.) On December 31, 1943, Capitol's Certificate of Winding Up and Dissolution was executed, but was not filed with the Secretary of State until June 5, 1944. (Tr. 358-359 in 13840.) (Defense Supplies' complaint was filed on February 16, 1944. (Tr. 3 in 13840).) *All* of the assets of Capitol were distributed equally to Kenyon and Adams at some date prior to June 5, 1944 (Tr. 108, 159 in 13840) and were immediately transferred to a limited partnership consisting of Kenyon and Adams, which continued Capitol's business (Tr. 159-161 in 13840). The limited partnership continued until the incorporation of Capitol Chevrolet Co. on April 10, 1946, at which time the assets were transferred to the new corporation, the stock of which was issued as directed by the partners. (Tr. 110-111 in 13840.)

It is perfectly clear from this that the present appellants were privies with Capitol in every sense of the word; there was privity of contract (they expressly assumed the liabilities); there was privity of estate (they succeeded to all the assets). It is also obvious that the appellants (having taken over all of the assets of Capitol) necessarily, actually and openly took over the defense of Capitol thereafter. In open court appellant Kenyon, on February 13, 1945, testified:

> "A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

Q. You are the owner of the Capitol Chevrolet Company?

A. Yes." (Tr. 354-355 in 13840.)

(It may be noted parenthetically that Kenyon overstated his interest; he was not *the* owner, he was a half owner with Adams.)

Appellant F. Norman Phelps in his deposition testified (in answer to a question concerning the new corporation):

"No, they (the new corporation) won't be responsible, but the people are the same, and I don't think there is any doubt in my mind as to whether or not if they lose the case the thing will be paid. I can assure you there has been nothing that has been done on any of these changes to do something to get rid of my liability. You can put that in the record." (Tr. 283 in 13840.)

And Mr. Phelps again:

"Q. You did know there was this litigation, however, as a result of this fire?

A. Definitely; knew that we had assumed the responsibility.

Q. You knew that?

A. That is right.

Q. You knew that when you took the position as President of Capital Chevrolet Company?

A. That is right; that is, the old company had responsibility; that is right.

Q. And that they had been assumed and that the litigation was still going on?

A. That is right." (Tr. 285-286 in 13840.)

Counsel for appellants at the pretrial conference stated as follows:

> "The Court. Let us protect your rights in this way: Would you stipulate that if the Capitol Chevrolet Company is determined to be liable that Kenyon would be liable under his agreement, subject to the validity of any defense he might have on the statute of limitations?
>
> Mr. Garrison (Counsel for Lawrence). Question of law.
>
> The Court. Just trying to save you gentlemen having to present proof.
>
> Mr. Archer (Counsel for Appellants). Yes, the contract is valid, no doubt about that." (Tr. 228 in 13840.)

> "Mr. Archer. One step has been skipped by Mr. Garrison and that is the stockholders of Capitol Chevrolet Company assumed the liabilities. There was no fraudulent transfers or anything. There was a contractual arrangement there. So I think that is the end of it. You have a perfectly valid transfer and an assumption of liabilities by the two stockholders.
>
> The Court. There is no question involved there. If you lose in this case, the judgment would have to go against these defendants.
>
> Mr. Archer. Yes, against Kenyon, and the only question is the statute of limitations." (Tr. 244 in 13840.)

In the face of these undisputed facts and testimony counsel have the temerity to assert that appellants Kenyon et al. were not in privity with or bound by the judgment against Capitol. The authorities cited

do not involve either (a) an express assumption of liabilities or (b) actual control of the litigation. Both of these factors exist here, and these appellants are not bona fide purchasers for value without notice, as counsel would apparently like to have the Court assume. The legal situation here is controlled, not by the authorities cited by appellants, but by such cases as:

Caterpillar Tractor Co. v. Int. Harvester Co., 120 Fed. (2d) 82, 139 A.L.R. 1 (C.C.A. 3rd, 1941);

Bates v. Berry, 63 Cal. App. 505, 509, 219 Pac. 83 (hearing S.Ct. denied) (1923);

Pann v. United States, 44 Fed. (2d) 321 (C.C.A. 9th, 1930).

c. The judgment is binding upon appellants regardless of form.

The third reason adduced by counsel in their effort to show that the judgment against Capitol was not binding upon the other appellants is that the judgment was not, under Rule 54(b), final for purposes of appeal. Two facets of this point are apparently presented, first, that the judgment was not final at the time of trial, and, second, that the judgment against Capitol (when entered) was not final because of the absence of an express determination by the District Court under Rule 54(b) that there was no just reason for delay.

There would appear to be several answers to these contentions. First, there is no showing that the judgment in question was not final under Rule 54(b).

Second, assuming that the judgment was not final for purposes of appeal under Rule 54(b), it is still binding upon these appellants, either by way of *res judicata* or because of their express assumption of Capitol's liability. And third, assuming that the judgment was not final and not binding by way of *res judicata,* it was still evidence of a liability of Capitol and the District Court's finding upon evidence is conclusive on appeal.

As we have previously pointed out, the District Court in its Order for Judgment did make an express direction for entry of judgment (Tr. 29 in 13840) and the docket entry refers to the filing of a final judgment (Tr. 6 in 13840). The judgment in the consolidated cases was a single one (Tr. 131-133 in 13840), and the *nunc pro tunc* Order Pursuant to Rule 54(b) refers to that judgment, although entitled by counsel only in one action (Tr. 179 in 13840). (It may be noted that this is not the only document entitled by counsel in only one of the two numbered actions and filed on behalf of cross-defendants in both actions; for example, the brief filed on behalf of all cross-defendants was entitled in action No. 23171 alone. (Tr. 439-440 in 13840).) It is apparent that the judgment referred to may well be final, even for purposes of appeal under Rule 54(b).

Assuming, however, that the judgment was not final for purposes of appeal under Rule 54(b), it is clear under the authorities that it was still binding upon these appellants who expressly assumed Capitol's

liabilities. A judgment not final in form is still *res judicata* if in fact it determines the issues and settles the controversy.

Miller Saw-Trimmer Co. v. Cheshire, 1 Fed. (2d) 899 (C.C.A. 7th, 1924);

Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co., 71 Fed. Supp. 111 (D.C. N.D. Cal. N.D., 1947);

Sewerage Comm. v. Activated Sludge, 81 Fed. (2d) 22 (C.C.A. 7th, 1936);

Larkin Auto. Parts v. Bassick Mfg. Co., 19 Fed. (2d) 944 (C.C.A. 7th, 1927).

Furthermore, these appellants expressly assumed the liabilities of Capitol and are in the same position as sureties. (*California Civil Code,* Section 2787.) Under familiar rules such a surety is bound by the judgment regardless of form, either as an exception to the strict *res judicata* rule or by a "fair and reasonable interpretation of the contract".

Kruger v. Calif. Highway Indmn. Exch., 201 Cal. 672, 257 Pac. 602 (1927), cert. denied 275 U.S. 568, 72 L.Ed. 430.

The only authority cited by counsel to sustain their position is *Merriam v. Saalfield,* 241 U.S. 22, 60 L. Ed. 868 (1916). The case is clearly distinguishable here, since the judgment there involved was interlocutory in substance as well as in form. Furthermore, there was not there involved any express assumption of the liabilities, as there is in the case at bar.

Lastly, assuming the nonfinality of the judgment and assuming further that it was not binding by way of *res judicata* or otherwise upon these appellants, still such a judgment is evidence of a liability of Capitol, and these appellants assumed Capitol's liabilities. Such evidence is sufficient to sustain the District Court's findings.

Lake County v. Mass. Bonding & Ins. Co., 84 Fed. (2d) 115 (C.C.A. 5th, 1936);

Lake County v. Mass. Bonding & Ins. Co., 75 Fed. (2d) 6 (C.C.A. 5th, 1935);

38 *C.J.S.* 1262-1263.

It is submitted that the judgment against Capitol is binding upon these appellants regardless of any purely formal technical objections thereto, and that counsel's strictures upon it are without substance. Counsel's disapproval of the judgment as to form was placed upon entirely different grounds (Tr. 133 in 13840), and the present attack is without merit.

III. THE CONTENTIONS RESPECTING LAWRENCE'S CONTRIBUTORY NEGLIGENCE, ETC.

The third and fourth points urged on behalf of appellants Kenyon et al. (pages 42 to 50 of Brief for Kenyon et al.) are based upon a wholly false premise. It is here urged (as it was on behalf of appellant Capitol) that Lawrence was itself negligent, both on the evidence and because of the language used in the judgment in favor of Defense Supplies. These ques-

tions were disposed of previously in this brief, but are here asserted by the appellants other than Capitol. These appellants expressly assumed the liabilities of Capitol, and since the latter's liability to Lawrence was established by the judgment in favor of Lawrence against Capitol, these appellants would not appear to be in a position to urge these defenses here. The defenses were asserted by Capitol unsuccessfully and that determination forecloses the same questions being raised again by those who assumed Capitol's liabilities.

The substance of Lawrence's claim against these appellants was that they assumed Capitol's liabilities. The assumption is conceded by counsel, and the liability was established by the judgment in favor of Lawrence against Capitol. Counsel's present arguments are without foundation and have in any event been disposed of herein in considering the same contentions raised by Capitol.

IV. LAWRENCE'S CROSS-CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

In the answers filed by counsel for appellants six separate statutes of limitation were pleaded by way of special defense. Reliance is now placed upon only one of these and that only by way of alleged "anticipatory breach". (Pages 50-52 of Brief for Kenyon et al.) The present argument omits any reference to the date upon which Lawrence was compelled to pay Re-

construction Finance Corporation. That judgment was paid on December 1, 1951 (Tr. 97, 343, in 13840), so that the cross-claims obviously were filed well within any limitation period. Counsel assert, however, that the cause of action was accelerated because of an "anticipatory breach by repudiation".

This point would appear to be disposed of by counsel's concession that "the cause of action is accelerated only at the option of the indemnitee" (Lawrence). (Page 51 of Brief for Kenyon et al.)

The authorities cited do no more than indicate that Lawrence, under the Federal Rules of Civil Procedure relating to cross-claims, *could* have brought in these appellants at an earlier date if it had been aware of them and had desired to do so. None of the authorities support the unusual position of counsel that Lawrence, under the penalty of the statute of limitations, was *compelled* to do so at an earlier time. The statute of limitations on a suit by an indemnitee against its indemnitor (and those who assumed the latter's liabilities) commences to run when the indemnitee suffers a loss (as here by payment to Reconstruction Finance Corporation). No authority is cited to support the argument that because the indemnitee *could* bring an earlier action on a contingent claim he *must* do so or be barred by the statute.

V. LAWRENCE'S LOSS AND DAMAGE.

The last point urged by counsel on behalf of appellants Kenyon et al. (pages 52-53 of Brief for Kenyon et al.) demonstrates the lack of merit in this appeal. Here, without any supporting authority, it is argued that Lawrence proved no loss or damage by paying the judgment in favor of Reconstruction Finance Corporation, because that judgment was not final for purposes of appeal under Rule 54(b)! It is not disputed that that payment was made; it was so stipulated (Tr. 343 in 13840) and the District Court so found (Tr. 123 in 13840). It is merely asserted that the indemnitee (Lawrence) suffered no loss or damage because the judgment which it paid was not final as to form for purposes of appeal. For rather obvious reasons no authority is cited for this remarkable position, and it need not be seriously considered here.

CONCLUSION.

It is respectfully submitted that the present appeal is wholly devoid of merit. No serious effort has been made on behalf of any of the appellants to demonstrate that Lawrence as principal was not entitled to indemnity from its agent Capitol (and the latter's successors who assumed its liabilities) for loss incurred by Lawrence on account of its agent's negligence. Counsel's ingenuity has offered to this Court innumerable charges of procedural error on the part of the District Court, none of which appear upon

examination to be of any substance. It is submitted that the District Court's determination was proper and that the judgment must be affirmed.

Dated, San Francisco, California,
November 9, 1953.

Respectfully submitted,
W. R. Wallace, Jr.,
Maynard Garrison,
John R. Pascoe,
Wallace, Garrison, Norton & Ray,
Attorneys for Appellee, Lawrence Warehouse Company.

(Appendix Follows.)

Appendix.

Appendix

As pointed out on page 31, subdivision III of this brief, we deemed the answer to appellants' asserted defense of *res judicata* so legally impotent and transparent that it might be disposed of by the terse comments presented in such subdivision. This Court will have occasion to burden itself with the following pages only if it deems a more amplified discussion of value.

Counsel's presentation of the *res judicata* point is primarily based upon three cases inexactly cited as involving a situation which did not in fact exist in such cases and one case which is clearly distinguishable. As to the three cases:

On page 55 of appellants' brief on behalf of Capitol it is stated:

> "* * * the California cases which permit action over by a principal against an agent *in the same action in which they are sued by third persons,* hold the parties to be estopped by the record in that action."

First cited for the above proposition is:

Salter v. Lombardi, 116 Cal. App. 602, 3 P. 2d 38 (1931).

There was no cross-complaint by any principal against any agent in that lawsuit.

Next cited by appellant is:

Bradley v. Rosenthal, 154 Cal. 420, 423, 97 Pac. 875 (1908).

Again, there was no cross-complaint by any principal against any agent in the lawsuit.

Next cited by appellant as authority for its extraordinary statement is:

> *Adams v. White Bus Line,* 184 Cal. 710, 713, 714, 195 Pac. 389 (1921).

For the third successive time counsel for appellant Capitol has cited to this Court as a case in which a cross-claim or cross-complaint was permitted "in the same action in which they are sued by third persons," *a decision in which there was no cross-claim or cross-complaint whatsoever.*

They cite no other cases but again in their separate brief on behalf of Kenyon, Adams and the Phelps, they refer to these three cases which do not involve any situation of cross-claims or cross-complaints as conclusive.

This Court has before it a case where *cross-claims were filed* in both 23171 and in 30473. It has a case before it in which the trial judge reserved jurisdiction to hear the cross-claims after its decision in the first hearing on the complaint of Defense Supplies and the answers of various defendants in 23171. It has before it a matter in which but for purely technical reasons its own prior opinion that Lawrence could be held only upon the principle of *respondeat superior* would be the law of the case warranting a summary judgment on the cross-claims against Capitol and those who succeeded to its property and assets.

In all such cases the California Courts have rejected the plea of *res judicata.*

Next pressed upon this Court as apposite is the decision in

Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

wherein a plaintiff in a subsequent case concerning the same subject matter was held bound by the determinations of the Court upon the same facts in a prior lawsuit. The case did not involve a continuing piece of litigation wherein the trial Court did not decide a particular matter at issue and reserved it for determination at a subsequent hearing. That is the situation now before this Court. And the decision in *Bernhard v. Bank of America,* supra, cited on page 55 (Capitol brief) and on page 44 (brief Kenyon, et al.) is in no way out of harmony with the manner in which the trial judge resolved appellants' technicality nor is it out of harmony with other decisions of the Appellate Courts of California in which facts and circumstances were pertinent to those here under review.

In

Hall v. Coyle (1952), 38 Cal. 2d 543, 241 P. 2d 257,

plaintiff alleged defendant had agreed to pay plaintiff for the alleged *negligent* destruction of a house. The answer denied the agreement and the *negligence.* Trial was had and defendant prevailed. Plaintiff then brought suit (not on the promise to pay for the destruction of the house) but for the *negligent* destruction thereof. The trial Court's judgment for plaintiff in the negligence case was affirmed despite

the plea of *res judicata.* The Supreme Court did not look narrowly to the judgment and the pleadings, nor did it confine its inquiry to such records and the findings of fact and conclusions of law in the first cause. The Supreme Court examined the entire record and found that the issue of *negligence* had been withdrawn from consideration in the first action and, therefore, properly held that it was open for contention, successful as to the plaintiff.

This Court is not required to go as far. The trial judge here had before it the same proceeding at a more advanced stage in a case in which the liabilities of cross-defendants *inter se* had not only not been adjudicated but expressly reserved for future final determination.

The trial Court retained jurisdiction to decide the cross-claims and has now, in fact, determined them on their merits. Such procedure was entirely proper. Had the efforts of defendants to reverse the holding of the trial judge on the complaints and answers been successful, there would have been no need to consume further time.

See:

Stark v. Coker, 20 Cal. 2d 839, 129 P. 2d 390 (1942);

United Bank & Trust Co. v. Hunt, 18 Cal. App. 2d 112, 62 P. 2d 1391 (1936).

There is not the slightest question but that where an issue is undecided even in a *prior* litigation, or is withdrawn from consideration therein, the Courts will

not apply the doctrine of *res judicata.* A joint and several judgment in favor of Defense Supplies Corporation was entirely proper since Capitol was the agent of Lawrence in the performance of duties undertaken by Lawrence for Defense Supplies. Obviously enough, Lawrence could not absolve itself from the consequences of its agent's fault.

Johnson v. Monson, 183 Cal. 149, 190 Pac. 635 (1920).

Even assuming that Lawrence had awaited decision against it on the complaint of Defense Supplies and then pursued its agent in a separate suit, the Court could look behind the joint and several judgment and find that it was based upon imputed negligence.

California Code of Civil Procedure, Section 1911;

Treece v. Treece, 125 Cal. App. 726, 14 P. 2d 95 (1932);

Watson v. Lawson, 166 Cal. 235, 135 Pac. 961 (1913);

Phipps v. Superior Court, 32 Cal. App. 2d 371, 375, 376, 89 P. 2d 698 (1939) (hearing S. Ct. denied);

Porello v. United States, 153 F. 2d 605 (2d Cir., 1946);*

Larson v. Barnett, 101 Cal. App. 2d 282, 225 P. 2d 295 (1950).

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*Subsequent proceedings in the above case, 330 U.S. 446, 91 L. Ed. 1011 and 94 Fed. Supp. 952, 955 (S.D. N.Y. 1950) do not affect the integrity of the holding.

No issue of cross-claims was involved in the case of

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918),

cited variously on pages 22, 51 and 53 of the brief for Capitol. There the railroad and its engineer were sued in one action. No cross-complaint was filed against such engineer. The jury brought in a verdict which was silent as to the engineer but gave the plaintiff a judgment against the railroad. In the hope of reversing the case upon the technical ground that a verdict absolving the agent cannot stand against the inactive principal whose negligence is imputed, the railroad counsel made no objection in the trial Court but appealed. The Supreme Court held that the railroad's negligence had been established at the trial and affirmed the judgment stating that "a verdict of the jury against one of two defendants is not a verdict in favor of the other defendant."

What pertinency that decision has to any aspect of this litigation is not apparent to us but in view of counsels' repeated citation thereof, we did not wish to leave it unnoticed.

Another case presenting the converse situation and twice cited by appellant Capitol (Brief pages 51 and 54) is

Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871 (1918).

Again no cross-claim was made by the railroad against its engineer. Since the complaint charged negligence on the part of the engineer *only,* the Appellate Court

held that the verdict of the jury against the railroad alone could not be upheld. Plainly such case is of no significance here either in any factual, procedural or other aspect.

The various cross-defendants below, however, did stand in precisely the same relations one to another as did the several defendants in

Molen v. Bussi, 118 Cal. App. 482, 483, 5 P. 2d 450 (1931).

In such case Molen, the plaintiff, and one Kennedy had been partners in the garbage business. Molen bought out Kennedy's interest and subsequently sold out to the Bussis for $200.00 cash and a note for $1300.00. Such note was the basis of Molen's action. Prior thereto Kennedy had asserted a claim to the business and sued the Bussis. Molen was made a defendant in such action and filed a cross-complaint against his co-defendants, the Bussis, upon the $1300.00 note. Upon objection of the Bussis that the cross-complaint in the action was not a proper subject for cross-complaint, the trial Court excluded it from consideration. Nevertheless, such Court made a finding thereon "that none of the allegations set forth in the cross-complaint filed by Molen were true."

The foregoing finding was asserted in the instant case as *res judicata.* In rejecting the plea the Court stated:

> "The plea invoked (res judicata) is a bold attempt to defeat the payment of an honest obligation." (p. 483.)

* * * * * * *

> "Where the matter is pleaded as a setoff or counterclaim * * * and is excluded and not taken into consideration in rendering judgment an action may afterward be maintained thereon." (p. 484.)
>
> "Where a former adjudication is pleaded it must appear that the adjudication was on the merits." (p. 485.)

Patently as in *Molen v. Bussi,* there had been no adjudication on the merits of the cross-claim until they were actually heard (the present phase of this proceeding). Likewise, as in said case, the question of cross-claims as we have repeatedly pointed out was excluded from consideration and reserved for determination with the consent of all parties when the Defense Supplies phase of the case was litigated.

The California Courts have vigorously resisted what is here sought to be accomplished, to wit: *An unconscionable use of the plea of res judicata to avoid a just obligation.*

Hall v. Coyle, supra;
Treece v. Treece, supra;
Molen v. Bussi, supra.

In all such cases the "judicial record" (a term used repeatedly by appellants' counsel without definition) has included in its scope the examination of all that transpired in the former litigation to avoid a miscarriage of justice due to technicality and to proclaim truth and expose falsity.

In

Tanaka v. Highway Farming Co., 76 Cal. App. 590, 245 Pac. 434 (1926),

it is held that even an express finding in a prior litigation in which the present plaintiff and defendant were co-defendants, that one was not entitled to indemnity from the other was not sufficient to justify the invocation of the rule of estoppel by judgment or *res judicata.* See also:

Standard Oil Co. v. J. P. Mills Organization, 3 Cal. (2d) 128, 140, 43 P. (2d) 797 (1935).

The foregoing authorities are but routine applications of the rule that: "As between co-defendants, nothing is adjudicated by a joint judgment against them." (33 *Corpus Juris,* p. 1131.)

While this question might be endlessly explored, amplified and re-enforced by citation of authorities in other jurisdictions, nevertheless, feeling as we do that the matter is completely answered in Section III of our brief, we feel it appropriate to bring this discussion to a close.

No. 13,840

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
Crocker Building, San Francisco 4, California,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Pacific Mutual Building, Los Angeles 14, California,
Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF FOR APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS.

JURISDICTIONAL STATEMENT.

Civil Action No. 30,473 was commenced on April 12, 1951, by the Reconstruction Finance Corporation, an agency of the United States, in which the Government of the United States owns more than one half

of the capital stock, against Capitol Chevrolet Company, Lawrence Warehouse Company, James A. Kenyon, Capitol Chevrolet Co., V. J. McGrew and Seaboard Surety Company. More than $3,000 was involved in the controversy. The foregoing averments are contained in the complaint, Paragraphs I and II (R. 38-39 in 13840). The jurisdiction of the District Court of the complaint of Reconstruction Finance Corporation is founded on 28 United States Code, sections 1331, 1345 and 1349.

On June 6, 1951, Lawrence Warehouse Company filed its answer and cross-claims against Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. On February 15, 1952, Lawrence Warehouse Company amended its cross-claim to add as cross-defendants Adams Service Co., James A. Kenyon, F. Norman Phelps and Alice Phelps. The cross-claims of Lawrence Warehouse Company against James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are the cross-claims involved in this appeal. Said cross-claims were filed pursuant to Rule 13(g), Federal Rules of Civil Procedure, and arose out of the same transaction or occurrence, i.e., the rendition and judgment in favor of Defense Supplies Corporation against Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew on or about April 15, 1946, that was the subject matter of the complaint of Reconstruction Finance Corporation and are ancillary to the complaint (Answer and Cross-claim of Lawrence, R. 56-57 in 13840).

Coastal Air Lines v. Dockery, 180 F. 2d 874 (8th Cir. 1950);

Lawrence v. Great Northern Ry. Co., 98 F. Supp. 746 (D.C. Minn. 1951);

United States Fidelity & Guaranty Co. v. Janich, 3 F.R.D. 16 at 19 (S.D. Cal. 1943).

The cross-claim of Lawrence Warehouse Company in Civil Action No. 23171 was consolidated for trial with its cross-claims in Civil Action No. 30473. The judgment in favor of Lawrence Warehouse Company in both actions was "entered" on February 12, 1953. On March 3, 1953, the court made its order and determination *nunc pro tunc* that there was no just reason for delay in entering the judgment in No. 30473 dated February 11, 1953, and ordered and directed the entry of said judgment (R. 179).

On March 10, 1953, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps each severally filed their notices of appeal from the judgment in favor of Lawrence Warehouse Company on February 12, 1953 (R. 179 et seq. in 13840). Jurisdiction on this appeal is founded on 28 United States Code, Section 1291.

STATEMENT OF THE CASE.

The principal questions for decision in this case are:

1. Whether the District Court could ignore fundamental principles of due process of law to hold these appellants bound by evidence which was not offered and could not have been offered against them.

2. Whether the District Court could ignore the only evidence offered and the judicial admissions of

appellee and the prior judicial determination against appellee that appellee's negligence contributed to the loss for which it was awarded indemnification.

On April 12, 1951, Reconstruction Finance Corporation filed its complaint in Action No. 30473 against Capitol Chevrolet Company (hereinafter called "Capitol"), Lawrence Warehouse Company (hereinafter called "Lawrence"), James A. Kenyon, Capitol Chevrolet Co. (to be distinguished from Capitol Chevrolet Company), V. J. McGrew and Seaboard Surety Company, the surety on Lawrence's supersedeas bond in Action No. 23171. The Complaint in No. 30473 was based on a judgment in favor of Defense Supplies Corporation against Lawrence, Capitol and one V. J. McGrew rendered in Action No. 23171; James A. Kenyon and Capitol Chevrolet Co. were averred to be liable for the obligations of Capitol in this second action, No. 30473. Lawrence again cross-claimed against Capitol and against James A. Kenyon and Capitol Chevrolet Co. Capitol, James A. Kenyon and Capitol Chevrolet Co. denied liability on the complaint of Reconstruction Finance Corporation and on the cross-claims of Lawrence.

On March 7, 1951, H. C. Alphson, Esq., and Dempsey, Thayer, Deibert & Kumler, attorneys for James A. Kenyon and Capitol in Action No. 30473, were substituted as attorneys for Capitol in No. 23171 (R. 4 in 13840).

On November 20, 1951, the court granted summary judgment in favor of Reconstruction Finance Corporation in No. 30473 against Lawrence, Seaboard

Surety Company, V. J. McGrew and Capitol, jointly and severally, in the amount of the judgment in favor of Defense Supplies Corporation ($42,171.70) plus interest and costs (R. 81 et seq. in 13840). No determination has been made of the claims of Reconstruction Finance Corporation against James A. Kenyon and Capitol Chevrolet Co. It is contended on this appeal that this judgment in favor of Reconstruction Finance Corporation is not final (See Rule 54(b), F.R.C.P.).

On February 15, 1952, Lawrence filed an amendment to its cross-claim in No. 30473 naming as additional cross-defendants Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps (R. 113 et seq. in 13840). F. Norman Phelps and Alice Phelps filed their answers to this cross-claim on March 5, 1952, and while it has been contended that Adams Service Co. was neither served nor appeared, the court held that Adams Service Co. appeared and defended on the merits (R. 134 et seq. in 13840). No question is raised on this issue on this appeal.

On March 4, 1952, on motion of Lawrence and in confirmation of a minute order entered on January 9, 1952, the court ordered that the "Above-captioned actions [No. 23171 and No. 30473] be consolidated for trial on March 5, 1952" (R. 18 in 13840). In their answers to the cross-claims of Lawrence, James A. Kenyon, F. Norman Phelps and Alice Phelps denied that judgment was rendered in favor of Defense Supplies Corporation against Lawrence, Capitol and V. J. McGrew because of the negligence

of Capitol and because of the failure of Capitol to perform its duties and obligations under the Agency Agreement dated October 1, 1942, under which Capitol had agreed to store tires and tubes for Lawrence (R. 99, 148 in 13840). As affirmative defenses these cross-defendants and appellants here pleaded that:

1. Lawrence was estopped by the judicial record, including Judgment, Findings of Fact and Conclusions of Law, in No. 23171 to deny that its active negligence was the cause or a contributing cause of the damage for which judgment was rendered in favor of Defense Supplies Corporation in No. 23171 (R. 102-103, 152 in 13840).

2. The independent active negligence of Lawrence caused or contributed to the cause of the damage for which judgment was rendered in favor of Defense Supplies Corporation in Action No. 23171 (R. 103, 152-153 in 13840).

3. Lawrence acquiesced in and consented to any negligence of Capitol, if any there were, which caused or contributed to the cause of the damage for which judgment was rendered in favor of Defense Supplies Corporation in Action No. 23171 (R. 103, 153 in 13840).

4. The cross-claim of Lawrence was barred by subsection (1) of Section 337 of the California Code of Civil Procedure and the claims therein set forth did not accrue within four years next before the commencement of the action (R. 101, 151 in 13840).

On this appeal it is urged that the court erred in finding as to these appellants that Capitol breached any duty to Lawrence and in failing to find in favor of the affirmative defenses.

For the purposes of this appeal, it is admitted that James A. Kenyon and Adams Service Co. assumed the liabilities of Capitol; it is also admitted for the purposes of this appeal that F. Norman Phelps and Alice Phelps are liable for the obligations of Adams Service Co. Inasmuch as the District Court held that Adams Service Co. appeared and defended on the merits although no pleadings were filed by it (R. 134 et seq. in 13840), those defenses and denials which were asserted by F. Norman Phelps and Alice Phelps are assumed to have been asserted by Adams Service Co.

On or before December 31, 1943, James A. Kenyon and Adams Service Co. assumed the liabilities of Capitol and acquired their interests in the assets of that company, which was dissolved on or before that date (R. 121; Ex. F, 357 in 13840). Thereafter the action by Defense Supplies Corporation against Capitol and Lawrence, Action No. 23171, was commenced, and the cross-claim of Lawrence against Capitol was filed (R. 3 in 13840). At the trial of the cross-claims against these appellants absolutely no evidence was introduced or admitted against these appellants to show that Capitol incurred any liability to Lawrence (R. 317, 322-323 in 13840). Counsel for Lawrence did not indicate in any way at the trial, nor

was it pleaded, that if as a result of the trial of the cross-claims a judgment was rendered in favor of Lawrence against Capitol in No. 23171, said judgment would be asserted as an estoppel against these appellants to prove that Capitol incurred a liability to Lawrence.* Apparently, however, this was the basis for the judgment in favor of Lawrence against these appellants (Order for Judgment, R. 29 in 13840). It is urged on this appeal that it was error to hold the judgment in No. 23171 to be an estoppel against these appellants because it was not offered against them, because it could not have been offered against them, these appellants not being in privity with Capitol and because it was not at the time of trial, and perhaps is not even now, a final judgment.

The District Court also held that James A. Kenyon and Adams Service Co. had actively participated in the defense of the action by Defense Supplies Corporation against Lawrence and Capitol and in the defense of Lawrence's cross-claim against Capitol (Finding, No. VIII, R. 121 in 13840). Lawrence did not plead or contend at any time during the trial of the cross-claims that these appellants participated in the trial of the complaint of Defense Supplies Corporation and absolutely no evidence was introduced in support of that finding. At the trial of the cross-claims no evidence of Capitol's liability to Lawrence was introduced, even in support of Lawrence's cross-claim in No. 23171, other than the evidence which had been

*The entire reporter's transcript of the trial of the cross-claims, including argument of counsel, is part of the transcript No. 13840.

introduced by Defense Supplies Corporation at the trial of its complaint against Lawrence and Capitol (R. 317 in 13840). Therefore it is urged on this appeal that the District Court erred in finding that these appellants participated in any trial in which evidence of Capitol's liability to Lawrence was adduced. Although Lawrence did not plead or indicate in any way at the trial that it would be contended that these appellants had defended and would be bound by the proceedings against Capitol, counsel for appellants specifically pointed out prior to the submission of the cause that no evidence had been, or could be, offered against appellants (R. 413-415 in 13840).

SPECIFICATION OF ERRORS.

1. The judgment against Capitol Chevrolet Company in No. 23171 must be reversed, thereby resulting in a reversal of the judgment against these appellants.

2. The Judgment and Findings of Fact (Findings, Nos. V, VI and VII, R. 119-121 in 13840) and the Conclusions of Law (Conclusions, Nos. I and II, R. 128-130 in 13840) are unsupported by the evidence in that absolutely no evidence was offered or admitted against these appellants showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company or caused any damage or loss to Lawrence Warehouse Company.

(a) The court erred in holding that the judgment to be rendered in favor of Lawrence Warehouse Company in No. 23171 was binding on these appellants.

(i) None of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are parties to the judgment in favor of Lawrence against Capitol, nor are they in privity with parties thereto nor did they aid or participate in, or have the right to control, the defense of the action in which that judgment was rendered.

(b) The court erred in holding that the judgment in favor of Lawrence Warehouse Company against Capitol Chevrolet Company in No. 23171 was binding upon the above-named appellants because said judgment was rendered subsequent to the trial of this action and said judgment may not even now be final.

3. The court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company, or was solely negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII and XXIII, R. 120-121, 125, 126, 127, 128 in 13840).

A. Lawrence Warehouse Company, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determination therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation.

B. Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store the tires and tubes of Defense Supplies Corporation in the Ice Palace knowing of its fire hazards and undertook to provide and did provide watchmen for the Ice Palace whose duty it was to protect the tires and tubes and who had actual knowledge of the acts of V. J. McGrew which caused the damage to the tires and tubes.

4. The court erred in failing to hold that the cross-claims of Lawrence Warehouse Company are barred by the statute of limitations (C.C.P. Sec. 337(1)).

5. The court erred in finding (Findings, No. X, R. 123 in 13840) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company, and in finding (Findings, No. XI, R. 123 in 13840) that on or about November 21, 1951, while said judgment was still in force and unsatisfied, cross-claimant Lawrence Warehouse Company paid plaintiff Reconstruction Finance Corporation the sum of $58,859.90 in full

satisfaction and discharge of said judgment in favor of said plaintiff.

6. For the foregoing reasons the court erred in granting judgment in favor of Lawrence Warehouse Company and in refusing to grant judgment in favor of appellants, and each of them.

SUMMARY OF ARGUMENT.

I. The judgment against Capitol Chevrolet Company in No. 23171 must be reversed, thereby resulting in a reversal of the judgment against these appellants.

II. The Judgment and Findings of Fact (Findings, Nos. V, VI and VII) and the Conclusions of Law (Conclusions, Nos. I and II) are unsupported by the evidence in that absolutely no evidence was offered or admitted against these appellants showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company or caused any damage or loss to Lawrence Warehouse Company.

A. The court erred in holding that the judgment to be rendered in favor of Lawrence in No. 23171 was binding on these appellants.

1. None of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are parties to the judgment in favor of Lawrence against Capitol, nor are they in privity with parties thereto nor did they aid or par-

ticipate in, or have the right to control, the defense of the action in which that judgment was rendered.

B. The court erred in holding that the judgment in favor of Lawrence against Capitol in No. 23171 was binding upon the above-named appellants because said judgment was rendered subsequent to the trial of this action and said judgment may not even now be final.

C. Consolidation could not under the federal practice supply the deficiencies in proof of plaintiff's case against these appellants.

III. The court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company, or was soley negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII and XXIII).

A. Lawrence, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determinations therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation.

IV. Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store the tires

and tubes of Defense Supplies Corporation in the Ice Palace knowing of its fire hazards and undertook to provide and did provide watchmen for the Ice Palace whose duty it was to protect the tires and tubes and who had actual knowledge of the acts of V. J. McGrew which caused the damage to the tires and tubes.

V. The court erred in failing to hold that the cross-claims of Lawrence Warehouse Company are barred by the statute of limitations (C.C.P. Sec. 337(1)).

(If these appellants are in privity with Capitol so as to be bound by the proceedings against Capitol, then the commencement of the cross-claim against Capitol in No. 23171 caused the statute of limitations to run against any other action asserting the same claim. The cross-claims in No. 30473 were filed more than four years after the filing of the cross-claim against Capitol in No. 23171.)

VI. The court erred in finding (Findings, No. X) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company, and in finding (Findings, No. XI) that on or about November 21, 1951, while said judgment was still in force and unsatisfied, cross-claimant Lawrence Warehouse Company paid plaintiff Reconstruction Finance Corporation the sum

of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff.

(The judgment in favor of Reconstruction Finance Corporation is not final and is subject to revision at any time (Rule 54(b) F.R.C.P.)

ARGUMENT.

I. THE JUDGMENT AGAINST CAPITOL CHEVROLET COMPANY IN NO. 23171 MUST BE REVERSED, THEREBY RESULTING IN A REVERSAL OF THE JUDGMENT AGAINST THESE APPELLANTS.

At the trial of the cross-claim of Lawrence against appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps no evidence was introduced to show that Capitol incurred any liability to Lawrence. Although the Findings of Fact and Conclusions of Law made by the court after the trial of the cross-claims apparently relate to all the cross-defendants, it is clear that the only basis on which the court granted judgment against these appellants was the judgment against Capitol. The court stated in its Order For Judgment (R. 29 in 13840):

> "James A. Kenyon and Adams Service Co. having actively participated in the defense of Capitol Chevrolet Company in No. 23171, the judgment in that action is res judicata as to them. Inasmuch as they assumed the liabilities of Capitol Chevrolet Company upon its dissolution they are liable for the amount of the judgment against Capitol."

F. Norman Phelps and Alice Phelps were held liable as the alter ego of Adams Service Co. (Order Amending Order for Judgment, R. 30 et seq. in 13840). Thus, the reversal of the judgment in favor of Lawrence against Capitol must necessarily result in a reversal of the judgment against these appellants.

Butler v. Eaton, 141 U.S. 240 (1891).

II. THE JUDGMENT AND FINDINGS OF FACT (FINDINGS, NOS. V, VI AND VII) AND THE CONCLUSIONS OF LAW (CONCLUSIONS, NOS. I AND II) ARE UNSUPPORTED BY THE EVIDENCE IN THAT ABSOLUTELY NO EVIDENCE WAS OFFERED OR ADMITTED AGAINST THESE APPELLANTS SHOWING THAT CAPITOL CHEVROLET COMPANY BREACHED ANY DUTY TO LAWRENCE WAREHOUSE COMPANY, INCURRED ANY OBLIGATION TO LAWRENCE WAREHOUSE COMPANY OR CAUSED ANY DAMAGE OR LOSS TO LAWRENCE WAREHOUSE COMPANY.

In the cross-claim of Lawrence against these appellants it is alleged as follows:

"V.

> The said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant as principal for and because of the negligence of cross-defendant Capitol Chevrolet Company, the agent of cross-claimant, and for no other reason. Cross-claimant is entitled to recover any sums paid by it under said judgment from cross-defendant Capitol Chevrolet Company by virtue of the relationship existing between them * * *." (R. 57 in 13840.)

"III.

That said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant solely because of the failure on the part of cross-defendant Capitol Chevrolet Company to perform its duties and obligations under the said written contract between said cross-defendant and cross-claimant, and for no other reason * * *." (R. 60 in 13840.)

No evidence was introduced against these appellants to prove the above averments. The only evidence to prove Capitol's liability to Lawrence introduced at the trial of the cross-claims was the transcript of testimony and exhibits which had been adduced at the trial of the complaint of Defense Supplies Corporation. This evidence was introduced only on the cross-claim of Lawrence against Capitol in Action No. 23171, the first action. It was not offered against these appellants. The following statements of the court and counsel at the trial demonstrate this fact (R. 317 in 13840):

"Mr. Garrison [Counsel for Lawrence]. I move that the record of evidence, the transcript in 23171, be before Your Honor at this time in connection with the cross-claim that is a part of that proceeding, and that it be considered by Your Honor in connection with the issues which have not been litigated in that case on the cross-claim.

Mr. Archer [Counsel for appellants]. You are offering it only as to 23171?

Mr. Garrison. Yes."

The transcript states further (R. 322-323 in 13840):

"Mr. Archer. Now I wonder, to get back to the other question, if we are starting with the evidence. I think before the evidence is presented, if that is what you are doing, I have some documents—for instance, the Phelps' answers are not due until tomorrow. Two additional defendants were served in the other case, 30473. Their time——

The Court. Let's wait until we get to that case; counsel, I understand are offering it only in the one case.

Mr. Garrison. 23171.

Mr. Archer. Aren't we offering evidence in 30473?

Mr. Garrison. No, I am only offering——"

And, further (R. 339-340 in 13840):

"The Court. The cases have been consolidated, and I think that probably any evidence in one case could be considered in the other anyhow.

Mr. Garrison. I think so, but I want to make certain.

Mr. Clark. That is subject to the same reservation.

Mr. Garrison. That is it.

Mr. Archer. I think counsel has stated that he was offering evidence first in one case, and that is the way I understood it.

The Court. All right."

Before submission of the cause counsel for appellants pointed out that no evidence had been offered against appellants (R. 413-415 in 13840).

The court's opinion, previously quoted, indicates that as to these appellants the evidence which the court considered as proving that Capitol incurred some liability to Lawrence was the judgment rendered after the trial and at the same time and in the same document as the judgment against these appellants (Order for Judgment, R. 29 in 13840). Among the several insuperable objections to this procedure is the fundamental objection that this judgment was never offered in evidence by Lawrence. Preliminarily it should be pointed out that the Federal Rules require a party to plead a judgment if reliance is sought to be placed on it (Rule 9(e) F.R.C.P.). This Lawrence did not do.

Whatever may be the rule as to other matters of judicial notice, it is clear that a party relying on a judgment as an estoppel must particularly refer to that judgment in the course of the trial; this is especially true where the persons against whom the estoppel is asserted are not even parties of record to that judgment. In *Paridy v. Caterpillar Tractor Co.,* 48 F. 2d 166 (7th Cir. 1931), the court had before it an action arising out of the alleged fraud of defendants in obtaining confidential information of the plaintiff. The trial court had granted a motion to dismiss on the ground that a former judgment, against the plaintiff was a bar to the instant action. The trial court had taken judicial notice of the prior proceedings to grant the motion to dismiss a judgment for defendant. In reversing this judgment, Circuit Judge Sparks stated for the court (pp. 168-169):

"While a court will invariably take judicial knowledge of the facts which it has acquired at a prior hearing of a cause (Murphy v. Citizens' Bank, supra—and in that case it was the same cause which was referred to), only under exceptional circumstances will it notice proceedings in another cause, although tried in that court and between the same parties. 15 R.C.L. p. 1111, § 42, and cases heretofore cited. The exceptional cases referred to are such as a proceeding for contempt in violating a prior decree, or a proceeding in garnishment in aid of a prior judgment; but in none of the decisions above referred to were these exceptional cases before the court.

The reason for the rule above referred to is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him. So, on a plea of res adjudicata, a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved. 15 R.C.L. p. 1111, § 42."

This case was followed in *Johnston v. Ota,* 43 C.A. 2d 94, 110 P. 2d 507 (1941).

A case strikingly analogous to the instant case is *Dillard v. McKnight,* 34 C.2d 209, 209 P.2d 387 (1949). That was an action for damages for wrongful death resulting from an automobile collision

brought by the parents of the decedent. The decedent died as a result of the injuries sustained in a collision between a Pontiac and a Studebaker, the Studebaker being operated by one McKnight. The decedent was a passenger in the Pontiac. The instant action was commenced against McKnight and his employer, J. F. Wilcox; the owner of the Studebaker automobile, W. J. Neville; Thorley Oil Company, and several fictitiously named defendants. The cause went to trial as to certain defendants and at the conclusion thereof a motion for a nonsuit was granted as to Thorley Oil Company. Judgment was granted for the plaintiffs against defendants McKnight and Wilcox and in favor of the defendant Neville. The court found that at all times mentioned in the complaint McKnight was the agent, servant and employee of the other defendants and that he was acting within the scope of his employment. Execution on this judgment was returned unsatisfied. As a result of certain evidence adduced upon the 1942 trial, plaintiffs claimed to have learned for the first time the identity of James A. Bower and Robert A. Thorley who were, approximately four years subsequent to the trial, served with process as Doe defendants, the complaint being amended to show their true names. The cause thereupon went to trial for the second time before the same judge, the court finding that the negligence of McKnight caused the automobile collision, that McKnight was employed by Wilcox, Thorley and Bower, but that at the time of the collision McKnight was not acting within the scope of his employment. Ac-

cordingly, judgment in favor of defendants Bower and Thorley was thereupon entered and the plaintiffs appealed. The evidence showed that Wilcox, Thorley and Bower were partners in an oil drilling venture in which McKnight was employed as a driller. On appeal, the plaintiffs argued that the findings and the judgment in the first trial of the action were binding on Thorley and Bower. The court denied this contention on three grounds: (1) Thorley and Bower not being in privity with Wilcox, they were not bound by the prior judgment; (2) the plaintiffs had failed to prove that Bower and Thorley had controlled the conduct of the prior litigation, and (3) plaintiffs had waived any right they might have had to assert the binding effect of the first judgment. On this latter point, Justice Spence stated for a unanimous court (p. 218):

> "Nor does it avail plaintiffs to rely on the principle of judicial notice in support of their present plea of res judicata. While a trial court is bound to take judicial notice of its own records in the same action (20 Am.Jr., Evidence, § 86, p. 104; 10 Cal.Jr., Evidence, § 52, p. 728; *Craiglow v. Williams,* 45 Cal.App. 514, 516 [188 P.76]; *Schomer v. R. L. Craig Co.,* 137 Cal.App. 620, 627 [31 P.2d 396]; *Mason v. Drug, Inc.*, 31 Cal. App. 2d 697, 701 [88 P.2d 929]; *In re Reader,* 32 Cal.App.2d 309, 313 [89 P.2d 654]), and matters which are subject of judicial notice are not dependent upon either pleading or proof for their effectiveness in the determination of issues before the court (20 Am.Jr., Evidence, § 25, p. 54; 10 Cal. Jr., Evidence, § 25, p. 698; *Altoona Quicksilver*

Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100, 103 [45 P. 1047]), the judgment entered against defendant Wilcox upon the conclusion of the first trial did not operate as a matter of law to conclude the rights of his co-partners, defendants Bower and Thorley. As so viewed, the situation here is akin to that existing when the former judgment, available in bar of the retrial of an issue, was entered not in the same, but in a different action, and proper evidence in proof of its effectiveness as a prior adjudication must be made in the trial of the subsequent action or the benefit will be held to have been waived. (50 C.J.S., Judgments, § 836, p. 404; see, also, *Johnston v. Ota,* 43 Cal.App.2d 94, 97 [110 P.2d 507].)"

The *Dillard* case is particularly pertinent because the court held that Thorley and Bower, admittedly liable for partnership obligations, were not bound by a prior judgment against one of the partners and that it was necessary for the plaintiffs to prove this obligation again as to them.

In *Wolfsen v. Hathaway,* 32 C. 2d 632, 638, 198 P.2d 1 (1948), the California Supreme Court held that a plaintiff waived its right to rely on a former judgment as an estoppel by failing to offer it in evidence.

In the case at bar counsel have searched in vain for any reference during the trial of the cross-claims, including argument of counsel, to the fact that Lawrence would rely on any judgment it might recover in the future against Capitol to prove its case. Due

process required that when cross-defendants terminated the presentation of evidence they were entitled to know the evidence that was to be used against them. It is not an answer to this argument to say that because the judgment had not yet been rendered, Lawrence could not have pleaded or proved it. Reliance on the judgment could have been pleaded, and due process would at least require some mention to have been made of the judgment during the presentation of Lawrence's case. In this regard it must be noted that Lawrence itself caused this predicament, for it was Lawrence who moved to consolidate for trial the cross-claims in No. 23171 and No. 30473 over the objections of counsel for cross-defendants (R. 210, 259, 321-322 in 13840). There is no injustice in holding Lawrence to the course of action which it voluntarily adopted. But to hold appellants bound by a judgment to which they are not parties, which was not pleaded nor proved against them, is to deny to appellants their day in court.

Furthermore the argument that by judicial notice the judgment to be rendered in No. 23171 establishes a liability of Capitol to Lawrence defeats itself. The court must also judicially notice that in the same judgment the cross-claim of Lawrence against Capitol in No. 30473 was dismissed (R. 133 in 13840). This operated as a dismissal on the merits (Rule 41(b), (c), F.R.C.P.). This judgment dismissing Lawrence's cross-claim against Capitol is a final judgment (R. 179 in 13840) from which no appeal has been taken, and as to which the time for appeal has passed. Thus by

judicial notice Lawrence is faced with a final judgment to which it is a party determining that Capitol is not liable to Lawrence.

A. THE COURT ERRED IN HOLDING THAT THE JUDGMENT TO BE RENDERED IN FAVOR OF LAWRENCE IN NO. 23171 WAS BINDING ON THESE APPELLANTS.

It has already been pointed out that the judgment to be rendered in favor of Lawrence against Capitol in No. 23171 was neither pleaded nor offered against these appellants. Assuming, arguendo, that said judgment had been pleaded and proved, and assuming that said judgment is not reversed, it nevertheless was error for the court to consider it to be binding on these appellants.

1. None of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are parties to the judgment in favor of Lawrence against Capitol, nor are they in privity with parties thereto nor did they aid or participate in or have the right to control, the defense of the action in which that judgment was rendered.

As has been pointed out, these appellants were never made parties to either the claim or cross-claims in Civil Action No. 23171. They are not parties to the judgment in favor of Defense Supplies Corporation against Lawrence, Capitol and McGrew; nor are they parties to the judgment in favor of Reconstruction Finance Corporation against Capitol and Lawrence. At the trial of the complaint of Defense Supplies Corporation, Capitol was represented by A. J. Getz and Cameron B. Aikens (R. 60 in 11418). On March 7, 1951, long after all the evidence had been

adduced in the trial of the claim of Defense Supplies Corporation, Dempsey, Thayer, Deibert & Kumler were substituted as counsel for Capitol in No. 23171 (R. 4 in 13840). Even assuming that Dempsey, Thayer, Deibert & Kumler, also counsel for these appellants, conducted the defense of Capitol in No. 23171 from that day on, none of the evidence which it is now asserted shows that Capitol incurred some liability to Lawrence was adduced at any trial in which said counsel appeared. Lawrence relied solely and completely on evidence introduced at the trial of the complaint of Defense Supplies Corporation. Thus, assuming that these appellants controlled the defense of Capitol in No. 23171 from March 7, 1951, to the present time, these appellants had no opportunity to cross-examine any witnesses or object to any evidence upon which the judgment in favor of Lawrence against Capitol is founded.

The circumstances under which these appellants can be bound by the judgment in favor of Lawrence against Capitol are clear. In the case of *Hy-Lo Unit & Metal Products Co. v. Remote C. Mfg. Co.,* 83 F. 2d 345 (9th Cir. 1936), Circuit Judge Wilbur, speaking for the court, reviewed the applicable Supreme Court decisions on this subject and concluded as follows (p. 350):

> "These decisions by the Supreme Court establish the proposition that, in order for a person not formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense

of the term or he must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense. Neither in the supplemental bill or the affidavits are there any facts alleged showing a right of the appellee to participate in and conduct the defense of the action prosecuted by appellant against the Potter Radiator Corporation or any interest of appellee in the subject-matter of that suit. It was not alleged in the supplemental bill nor shown in the affidavits that appellee had agreed with the Potter Radiator Corporation to participate and exercise joint control over the defense of the individual suit prosecuted by the appellant against that company or had agreed with appellant to be bound by the judgment in that suit. Consequently, appellee was a stranger to the suit. It follows that the trial judge did not err in refusing to allow appellant to file its supplemental bill.

The decision by this court in Carson Investment Co. v. Anaconda Copper Mining Co., 26 F. (2d) 651, 657, relied upon by appellant, is in accord with the decisions of the Supreme Court above cited. In that case we said: 'We agree with appellee in the contention that the judgment could not be relied upon as an estoppel merely because the Anaconda Copper Company contributed some money toward the defense of the American Smelting & Refining Company suit, gathering testimony for the defense; but that does not meet the broader proposition that if the Anaconda Company directed its counsel to confer with counsel for the American Smelting & Refining Company, and if such counsel participated

> in the preparation of the case for trial and in the trial of the issues, and if the Anaconda Company had the right to exercise joint control over the litigation, and did actually co-operate with the American Smelting & Refining Company in the trial and appellate courts * * * it became privy to the American Smelting & Refining Company suit.' "

Under the established decisions of this court and the Supreme Court of the State of California, appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are not in privity with Capitol. *Boulter v. Commercial Standard Ins. Co.,* 175 F.2d 763 (9th Cir. 1949), was an action by husband and wife against an insurance company to recover on a judgment which they had previously recovered against the owner and driver of a truck which had collided with their automobile and injured them. The insurance company defended on the ground that the accident was not covered by the provisions of the policy and that they had obtained a default judgment against the owner and driver of the truck declaring that the truck was not covered by the policy at the time of the accident. The district court in the instant action denied the defense based on the default judgment but granted the insurance company's motion for judgment notwithstanding the verdict on other grounds. In reversing this action, Circuit Judge Pope, speaking for the court, stated (p. 768):

> "Finally, appellee argues that the court should have upheld its plea of res judicata in which it

set up its declaratory judgment. Notwithstanding the Boulters were never served in the declaratory judgment suit, it is asserted that they are bound by that judgment because, it is argued, they were in privity with Warner. The rights which the Boulters acquired under the policy became vested long prior to the institution of the suit for declaratory judgment. Under the law of California, which controls here, a privy is '* * * one who, *after rendition of the judgment,* has acquired an interest in the subject matter affected by the judgment through or under one of the parties.' (Emphasis ours.) Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, 894. This court has quoted Freeman on Judgments, Sec. 162, to the effect that 'no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.' Norton v. San Jose Fruit Packing Co., 9 Cir., 83 F. 512, 514.

The court below properly disregarded the plea of res judicata."

In the instant action the only evidence on the question and the findings of the trial court (R. 121, 159, 162, 357 et seq. in 13840), show that prior to December 31, 1943, the assets of Capitol Chevrolet Company were distributed to its stockholders James A. Kenyon and Adams Service Co. and on that date the Certificate of Winding Up and Dissolution was executed (R. 357 et seq. in 13840). On May 31, 1943, the stockholders of Capitol Chevrolet Company had authorized its dissolution and agreed that upon the

transfer to them of its assets they would assume the liabilities of the corporation (R. 159, 162 in 13840). On February 16, 1944, the complaint of Defense Supplies Corporation was filed, and on May 8, 1944, the cross-claim of Lawrence against Capitol was filed (R. 3 in 13840). Appellants having acquired their interests and assumed the liabilities of Capitol prior to the commencement of both the claim of Defense Supplies Corporation and the cross-claim of Lawrence, they are clearly not in privity with Capitol.

It is equally clear that these appellants did not aid in the defense or participate and control the defense of Capitol in the trial of the claim of Defense Supplies Corporation, that being the only trial in which it can be asserted that any evidence was introduced to show that Capitol incurred some liability to Lawrence. Primarily, it should be emphasized that Lawrence did not plead or contend at any time during the trial that James A. Kenyon and Adams Service Co. defended on behalf of Capitol. In *Dillard v. McKnight,* 34 C. 2d 209, 209 P.2d 387, the facts of which have been previously stated, Justice Spence stated for the court (p. 217):

> "But the frailty of plaintiffs' position in this respect arises from their failure to urge the claim of res judicata until they moved unavailingly for a new trial herein, and at no time in the proceedings of the second trial did plaintiffs put in issue the question of the participation of defendants Bower and Thorley in the conduct of the prior litigation. Neither Bower nor Thorley nor the partnership was named as a party to the ac-

> tion as it was prosecuted through the first trial and culminated in a judgment against defendant Wilcox, and defendants Bower and Thorley in the second trial might have been able to prove that they did not participate in the conduct of the prior defense or agree to have their copartner Wilcox conduct it for them had plaintiffs attempted to prove that they did. The entire matter of such alleged participation and exercise of control would be a question of fact to be resolved from the evidence adduced thereon, and defendants Bower and Thorley would be entitled to have their day in court in challenge of such charge by plaintiffs. (See 4 Jones' Commentaries on Evidence (2d ed.) § 1810, p.3351 et seq.) Otherwise, to follow plaintiffs' theory, mere knowledge of one partner that his copartner is being sued on an alleged partnership transaction would be sufficient to render the first judgment res judicata on all issues litigated, if in the subsequent prosecution of the action against the later-served partner proof is made of the relationship he sustained to the party-defendant in the prior trial. Such an extension of the doctrine of res judicata cannot be reconciled with the requirements of due process as above discussed."

Although Lawrence took the deposition of F. Norman Phelps and Alice Phelps (R. 262 et seq., 295 et seq. in 13840) and were permitted to reopen their case at the trial of the cross-claims to cross-examine Mr. Kenyon, who was then present (R. 373-374 in 13840), there is absolutely no evidence that these appellants aided in or participated in or controlled the defense at the trial

of the claim of Defense Supplies Corporation. In fact there is no intimation of even the vaguest sort by counsel or in the evidence that these appellants participated in any trial in which evidence of Capitol's liability was adduced. Assuming that the record of that trial could be looked at to establish its admissibility and that it was offered for this purpose against these appellants, there is still no such evidence.

Adams Service Co., F. Norman Phelps and Alice Phelps are nowhere mentioned in the entire record. As to James A. Kenyon, the only thing that appears is that he was called as a witness under Rule 43(b) by the plaintiff. Part of his testimony is as follows (R. 200 in 11418):

"The Clerk: Will you state your name to the Court please.

A. James A. Kenyon.

Direct Examination

By Mr. Miller: [Attorney for Defense Supplies Corporation]

Q. Will you speak out loud, Mr. Kenyon; you are quite a ways away from us?

A. I will.

Q. Are you an officer of the Capitol Chevrolet Company, Mr. Kenyon?

A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

Q. You are the owner of the Capitol Chevrolet Company? A. Yes.

Mr. Getz: It was a corporation and was dissolved.

By Mr. Miller:

Q. Were you president of the company?

A. Yes. We did not dissolve until May 31."

To establish that these appellants are not in privity with Capitol, the above quoted testimony of James A. Kenyon was reintroduced by appellants at the trial of the cross-claims (R. 354-356 in 13840). The record at the trial of the cross-claims also shows that counsel for Lawrence was present in the courtroom at the time this statement was made (R. 354-356 in 13840). The law is clear that in such a situation James A. Kenyon is not bound by the proceedings on the trial of the claim of Defense Supplies Corporation.

In *Wilgus v. Germain,* 72 Fed. 773 (9th Cir. 1896), this court had before it an action for damages for the infringement of a patent. Plaintiff contended that the defendant Germain was estopped by the judgment in a prior action against a corporation in which Germain was a stockholder and at the trial of which action Germain was in court, was a witness and took a leading part. It was also contended that defendant Newton was estopped by a prior judgment in favor of plaintiff against a corporation in which Newton was a stockholder and its secretary and treasurer. In the trial of the previous action Newton had been present in court and had been a witness. The lower court rendered judgment for defendants and the plaintiff appealed. This court affirmed the judgment and in an opinion by Circuit Judge Gilbert held that the evidence was insufficient to show that

Germain and Newton had participated in the trial against the corporation (see 72 Fed. 773 at 775-776).

Similarly, the Supreme Court of California has held that an attorney who acquired title to land prior to the commencement of an action in the nature of a creditors' bill against his predecessors in interest was not estopped by the judgment in such action even though he was the attorney for his predecessors in interest and as such cross-examined the witnesses.

Lange v. Braynard, 104 Cal. 156, 37 Pac. 868 (1894).

Parenthetically it should be pointed out that no notice or opportunity to defend the action by Defense Supplies Corporation against Lawrence was given these appellants.

See:

Washington Gas Co. v. Dist. of Columbia, 161 U.S. 316 (1895);

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950).

It is of no assistance to Lawrence that these appellants may have defended on behalf of Capitol the claim of Reconstruction Finance Corporation against Capitol in No. 30473. The judgment in No. 30473 in favor of Reconstruction Finance Corporation does not establish any liability by Capitol to Lawrence, and in fact Lawrence's cross-claim against Capitol in No. 30473 was dismissed by the lower court and judgment was granted for Capitol (R. 131-133 in 13840). Fur-

thermore, said judgment in favor of Reconstruction Finance Corporation is of no legal effect. On its face it shows that the cross-claims in No. 30473 were still pending at the time it was rendered (R. 81 et seq. in 13840). The record in No. 30473 further discloses that the claims of Reconstruction Finance Corporation against James A. Kenyon and Capitol Chevrolet Co. (not to be confused with Capital Chevrolet Company referred to herein as "Capitol") are still pending (R. 43, 81 et seq. in 13840). Therefore, the judgment in favor of Reconstruction Finance Corporation is not final but is subject to revision at any time (Rule 54(b), F.R.C.P.).

The foregoing authorities establish that these appellants are not bound by the judgment in favor of Lawrence against Capitol and also establish, for the same reasons, that these appellants could not be bound by the transcript of testimony and exhibits adduced at the trial of the complaint of Defense Supplies Corporation, although, as previously pointed out, such evidence has never been offered or adduced as to these appellants.

B. THE COURT ERRED IN HOLDING THAT THE JUDGMENT IN FAVOR OF LAWRENCE AGAINST CAPITOL IN NO. 23171 WAS BINDING UPON THE ABOVE-NAMED APPELLANTS BECAUSE SAID JUDGMENT WAS RENDERED SUBSEQUENT TO THE TRIAL OF THIS ACTION AND SAID JUDGMENT MAY NOT EVEN NOW BE FINAL.

Assuming, arguendo, that the judgment in favor of Lawrence against Capitol had been offered against appellants, and assuming, arguendo, that they are in

privity with Capitol, the judgment is still not binding on them because it was not final at the time of trial. In Action No. 23171 there are cross-claims of Lawrence against Clyde W. Henry and Constantine Parella still pending (R. 3, 4 in 13840). Also there has been no adjudication of the cross-claims of Capitol in Action No. 23171 against Henry and Parella (R. 3, 4 in 13840). Clearly at the time of the trial of the cross-claims there had been no determination under Rule 54(b), Federal Rules of Civil Procedure, that there was no just reason for delay in entering the judgment in favor of Lawrence against Capitol in No. 23171 and directing its entry. Therefore, that judgment was not final but was subject to revision at any time. The Supreme Court of the United States has ruled that a judgment which is not final cannot be res judicata or an estoppel. In *Merriam v. Saalfield,* 241 U.S. 22 (1916), the court had before it an action for unfair competition in the business of publishing and selling dictionaries. The action was originally commenced against Saalfield who duly appeared and defended. The trial court dismissed the complaint but the Court of Appeals reversed and remanded the case for an injunction and an accounting. The district court made a decree in accordance with the mandate and an order for reference for the accounting. Thereafter a supplemental bill was filed charging that one Ogilvie had from the beginning actively conducted, controlled and directed the defense of the suit, having selected, retained and paid the solicitors and counsel for Saalfield

and that Ogilvie was the proprietor of the dictionaries involved in the suit. Ogilvie was served with process and a final decree was entered against him. Thereafter, however, Ogilvie appeared specially and successfully moved to quash the service of the subpoena issued against him and to set aside all proceedings based thereon. The trial court also denied a petition filed by the complainant for enforcement of the final decree against Ogilvie. The complainant appealed and the Supreme Court affirmed the action of the trial court on the grounds that Ogilvie could not be bound by the decree of the district court made after remand and that the court had no jurisdiction of the claim against Ogilvie. On the first ground, Justice Pitney stated for the unanimous court (pp. 28-29):

> "In so holding, the court applied the doctrine that has been laid down in a number of cases, that a third party does not become bound by a decree because of his participation in the defense unless his conduct in that regard was open and avowed or otherwise known to the opposite party, so that the latter would have been concluded by an adverse judgment. See *Andrews v. National Pipe Works,* 76 Fed. Rep. 166, 173; *Lane v. Welds,* 99 Fed. Rep. 286, 288. We need not consider the soundness of the doctrine, for appellant does not question it, insisting only that it is not applicable here because Ogilvie's control of the defense made in Saalfield's name became known to appellant during the progress of the suit, and before final decree; it being contended that the decree of September 11, 1912, was interlocutory and not final.

> But it is familiar law that only a final judgment is *res judicata* as between the parties. And it is evident that a decree cannot be *res judicata* as against a third party participating in the defense unless it is so far final as to be *res judicata* against the defendant himself. Hence, if the decree of September 11 was not final as between appellant and Saalfield, it cannot be *res judicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is found to be this: that upon the theory that Ogilvie would be estopped by a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles."

Were there no other points involved in this appeal, this holding in the *Merriam* case would require the judgment appealed from to be reversed.

C. CONSOLIDATION COULD NOT UNDER THE FEDERAL PRACTICE SUPPLY THE DEFICIENCIES IN PROOF OF PLAINTIFF'S CASE AGAINST THESE APPELLANTS.

Actions No. 23171 and No. 30473 were, on motion of Lawrence, consolidated for trial. The Order of Consolidation reads as follows (R. 18 in 13840):

> "Pursuant to Rule 42(a) of Federal Rules of Civil Procedure, and in confirmation of minute

order heretofore made and entered on January 9, 1952, it is hereby ORDERED that the above-captioned actions be consolidated for trial on March 5, 1952.

Dated: March 4, 1952.

Louis E. Goodman
Judge of the United States
District Court"

It has been decided that the legal effect of such an order in the federal courts is not a merger of the actions consolidated. In *Johnson v. Manhattan Ry. Co.,* 289 U.S. 479 (1933), Justice Van Devanter, speaking for the court, stated (pp. 496-497):

> "The District Judge, as shown in his opinion, was in doubt whether the attack was direct or collateral, but conceived that the doubt could be removed and the attack made direct by ordering a consolidation of the two suits, which he did on his own motion over objections by the parties to the American Brake Shoe Company suit. The order of consolidation has since been reversed by the Circuit Court of Appeals; but, quite apart from the reversal, the consolidation did not alter the nature of the attack. Under the statute, 28 U.S.C., § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."

This case has been followed consistently under the Federal Rules of Civil Procedure.

See:

Greenberg v. Giannini, 140 F. 2d 550 at 552 (2d Cir. 1950);

National Nut Co. v. SuSu Nut Co., 61 F. Supp. 86 (N.D.Ill. 1945);

United States v. Bregler, 3 F.R.D. 378 at 379 (E.D.N.Y. 1944).

In *Greenberg v. Giannini,* supra, Circuit Judge Learned Hand stated (p. 552):

> "The first question is of the validity of the service upon the Transamerica Corporation; it must be decided as though the two actions had remained unconsolidated, because the order did not merge them—contrary to the apparent assumption of both parties—but was only a convenience, accomplishing no more than to obviate the duplication of papers and the like. Johnson v. Manhattan R. Co., 289 U.S. 479, 496, 497, 53 S.Ct. 721, 77 L.Ed. 1331."

Evidence in one case becomes evidence in another case only if the parties so agree or the court so orders prior to trial.

National Nut Co. v. SuSu Nut Co., 61 F. Supp. 86 (N.D.Ill. 1945).

There is no agreement or order to such effect in the instant case. Thus, even in the ordinary situation, evidence in one consolidated case does not by merger become evidence in the other. There is therefore no conceivable ground in the instant situation upon which the evidence introduced at the trial of the complaint

of Defense Supplies Corporation (the only evidence offered in either of the cases now on appeal to show Capitol's liability to Lawrence) could become evidence in the second action, No. 30473; that evidence was introduced not only long before the second action was filed but seven years before the order for consolidation was made. Assuming, arguendo, that the effect of consolidation was to merge the two actions, that evidence still would not be admissible and could not be considered as to these appellants because they were not parties or in privity with parties to the action at the time the evidence was introduced.

From an evidentiary standpoint the effect of consolidation in the instant case is conclusively dictated by circumstances previously pointed out. At the trial both the court and counsel for Lawrence limited the evidence of Capitol's liability to Lawrence to the cross-claim in the first action, No. 23171, and led counsel for appellants to believe it was so limited (R. 317, 322-323, 339-340 in 13840). In fact, appellants, as cross-defendants in the second action, were not even permitted to file their motions to dismiss, and F. Norman Phelps and Alice Phelps were not permitted to file their answers until after the evidence had been offered in No. 23171 (R. 322-323).

From the foregoing analysis arise three independent and separate reasons why the judgment against these appellants must be reversed:

1. No evidence was offered or admitted against appellants to show a liability of Capitol to Lawrence.

2. Under the settled law of this court and the decisions of the State of California, appellants cannot be bound by the judgment or evidence against Capitol.

3. Under the decisions of the Supreme Court of the United States the judgment against Capitol, not being final, cannot be *res judicata* against appellants.

The sustaining by this court of any one of these grounds results in a complete failure by Lawrence to establish a claim against any of these appellants.

III. THE COURT ERRED IN FAILING TO FIND THAT LAWRENCE WAREHOUSE COMPANY WAS EQUALLY, JOINTLY AND CONTRIBUTORILY NEGLIGENT OR NEGLIGENT IN ANY OF SAID WAYS WITH CAPITOL CHEVROLET COMPANY, OR WAS SOLELY NEGLIGENT IN CAUSING THE DAMAGE FOR WHICH JUDGMENT WAS RENDERED IN FAVOR OF DEFENSE SUPPLIES CORPORATION IN CIVIL ACTION NO. 23171, AND IN FINDING TO THE CONTRARY (FINDINGS, NOS. VI, VII, XIII, XVII, XVIII, XIX, XXII AND XXIII).

The previous discussion established that Lawrence failed to prove any basis for a claim of relief against appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps. That alone requires the judgment appealed from to be reversed and that judgment be rendered in favor of the appellants. Appellants, however, established on evidence, which is uncontroverted and which Lawrence did not even seek to controvert, a valid and sufficient defense to Lawrence's claim. Under the law of Cali-

fornia, the rule of decision in the instant action, there can be no contribution between joint tort-feasors; the California Supreme Court has expressly rejected the doctrine that one "actively negligent" can recover from one "passively negligent."

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136 at 138-139, 140, 121 Pac. 379 (1912).

This court has stated that unless an indemnitor is an insurance company, an indemnity agreement will not be construed to cover negligent acts of the one indemnified.

United States v. Wallace, 18 F. 2d 20 (9th Cir. 1927).

In fact the indemnity agreement would not preclude Capitol from indemnification by Lawrence for Lawrence's negligent acts exposing Capitol to liability.

Washington & Berkeley B. Co. v. Pennsylvania S. Co., 215 Fed. 32 (4th Cir. 1914).

Thus, even assuming that the indemnification agreement executed when Capitol stored the tires and tubes in its own warehouses applied to the storage in the Ice Palace (of which there is no evidence), that agreement would not permit Lawrence to recover from Capitol for damages caused in part by Lawrence's own negligent acts. Nor in such case would the principal and agent relationship entitle Lawrence to indemnification by Capitol.

Green v. Southern Pacific Co., 53 C.A. 194 at 201, 203, 199 Pac. 1059 (1921), hearing in Supreme Court denied;

1 Mechem, Agency (2d Ed. 1914), Sec. 1287.

Furthermore, the agent is entitled to indemnification from the principal for negligent acts of the agent directed by the principal.

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908);

Horrabin v. City of Des Moines, 198 Iowa 549, 199 N.W. 988 (1924);

1 Mechem, Agency (2d Ed. 1914), Sec. 1603.

Appellants contend that the only evidence involved in the cross-claims against these appellants shows that Lawrence's independent active negligence caused the loss for which recovery is sought.

A. LAWRENCE, HAVING PARTICIPATED IN THE TRIAL OF THE COMPLAINT OF DEFENSE SUPPLIES CORPORATION IN NO. 23171, IS BOUND BY THE DETERMINATION THEREIN THAT ITS ACTS JOINED AND CONCURRED IN CAUSING THE DAMAGE TO THE TIRES AND TUBES OF DEFENSE SUPPLIES CORPORATION.

At the trial of the cross-claims appellants introduced, without objection by Lawrence, the complaint of Defense Supplies Corporation, the answer of Lawrence and its cross-claim against Capitol and others, the answer of Capitol and its cross-claim against others, the findings of fact and conclusions of law and the judgment, all in Action No. 23171 (Exhibits A, B, C, D, E, R. 347-354 in 13840). Although these appellants were not parties to Action No. 23171 and not bound by the record in that action, that record was admissible and conclusive against Lawrence because Lawrence was a party to that action.

Bernhard v. Bank of America, 19 C.2d 807 at 811-813, 122 P. 2d 892 (1942).

The operative portion of the judgment in No. 23171 reads as follows (R. 347-348 in 13840):

> "Now, Therefore, It is Ordered, Adjudged and Decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation and V. J. McGrew, jointly and severally, the sum of $41,975.15 together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $196.55."

A judgment such as this establishes that Lawrence and Capitol were joint tort-feasors not entitled to indemnity under the law of California.

In *Adams v. White Bus Line,* 184 Cal. 710, 195 Pac. 389 (1921), the Supreme Court of California had before it an action in which the plaintiff, a passenger upon a stage of the defendant White Bus Line, suffered personal injuries as a result of a collision between the stage and an automobile driven by the other defendant, Stiles. The defendants were both joined in the action as being jointly and severally liable for the accident, and the court so found. Thereafter the indemnity insurer of the bus line paid the amount of the judgment to the plaintiff, and an assignment of the judgment in the name of an employee of the White Bus Line was made. Defendant Stiles thereupon applied to the court for an order directing the entry of the satisfaction of the judgment on the ground that the payment to the indemnity company satisfied the judgment as to both defendants. The

court directed such entry of satisfaction and defendant White Bus Line appealed. In affirming the action of the trial court, the Supreme Court first held that the insurer stood in the position of the bus line and that the assignment could not avoid the doctrine that there is no right of contribution between joint tort-feasors. Justice Sloane went on to state for the court (p. 713):

> "The great weight of authority, however, is against the right of contribution between defendants whose concurrent negligence has made them jointly liable in damages. The rule applicable to this case is stated in *Harbeck v. Vanderbilt,* 20 N.Y. 395: 'Where one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment becomes extinguished, whatever may be the intention of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. If, therefore, in such a case, a party take an assignment to himself, or, unless under special circumstances, to a third person for his own benefit, the assignment is void and the judgment is satisfied.'
>
> Where one of several joint wrongdoers pays a judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of a man of straw."

The holding in this case was followed in *Smith v. Fall River J. U. High School Dist.,* 1 C.2d 331, 34 P.2d 994 (1934); see also, *Benson v. Southern Pacific Co.,* 177 Cal. 777, 171 Pac. 948 (1918).

A joint judgment such as that rendered in the instant case has also been held to preclude indemnification in jurisdictions which otherwise permit one passively negligent to be indemnified by one actively negligent.

Maryland Casualty Co. v. Frederick Co., 142 Ohio State 605, 53 N.E.2d 795 (1944).

Findings Nos. V, VI and VII in No. 23171 read as follows (R. 80-81 in 11418):

"V.

On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire."

"VI.

The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

"VII.

By reason of said negligence acts of defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15."

In the brief of appellant Capitol Chevrolet Company (pp. 52, 53, 54) the significance of these findings under the law of California is set forth; such findings preclude indemnification.

Salter v. Lombardi, 116 Cal. App. 602, 3 P.2d 38 (1931), hearing in Supreme Court denied;

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

It is of additional significance that the complaint in No. 23171 does not aver Lawrence to be liable on a theory of *respondeat superior* and such is not the basis of liability set forth in the findings, conclusions and judgment.

IV. LAWRENCE WAREHOUSE COMPANY EXPRESSLY DIRECTED CAPITOL CHEVROLET COMPANY TO STORE THE TIRES AND TUBES OF DEFENSE SUPPLIES CORPORATION IN THE ICE PALACE KNOWING OF ITS FIRE HAZARDS AND UNDERTOOK TO PROVIDE AND DID PROVIDE WATCHMEN FOR THE ICE PALACE WHOSE DUTY IT WAS TO PROTECT THE TIRES AND TUBES AND WHO HAD ACTUAL KNOWLEDGE OF THE ACTS OF V. J. McGREW WHICH CAUSED THE DAMAGE TO THE TIRES AND TUBES.

The only evidence offered at the trial of the cross-claims to show whose negligence caused the loss of tires and tubes was that offered by these appellants.

This evidence is concise, unambiguous and determinative of this appeal. The following portion of the verified answer of Lawrence in No. 23171 was read into the record at the trial (R. 351-352 in 13840):

> "Incident to said storage and the rental of said premises, plaintiff directed that this defendant [Lawrence] employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff."

The remainder of the evidence on this question consists of the testimony of appellant James A. Kenyon. It shows conclusively that:

1. Pursuant to the Agency Agreement Capitol stored tires and tubes in eleven different warehouses in Sacramento belonging to it (R. 361-362 in 13840);

2. Thereafter Lawrence directed Capitol to consolidate the storage of tires and tubes in the Ice Palace (R. 363-366 in 13840);

3. Capitol did not desire to store the tires and tubes in the Ice Palace (R. 363 in 13840);

4. Lawrence inspected the Ice Palace and was aware of its fire hazards when it directed Capitol to store the tires and tubes there (R. 368-372 in 13840);

5. Prior to the storage of the tires and tubes in the Ice Palace Lawrence undertook to provide

and subsequently maintained watchmen for the Ice Palace (R. 366 in 13840).

This testimony and the judicial admission in Lawrence's pleading were the only evidence offered by either party at the trial of the cross-claims in No. 30473. It is not contradicted, and counsel for Lawrence did not even cross-examine Mr. Kenyon on these subjects or seek to impeach him (R. 373 in 13840). It is clear, therefore, that under the law of California and the law generally these appellants established an absolute defense to the claim of Lawrence. This defense was not contradicted by any evidence even though Lawrence was permitted to reopen its case (R. 374 et seq. in 13840), nor did Lawrence seek to offer evidence on this point when it moved to reopen the case after the original order for judgment had been made (R. 171 et seq. in 13840). Consequently, the judgment of the trial court must be reversed and the action remanded with directions to enter judgment for these appellants.

V. THE COURT ERRED IN FAILING TO HOLD THAT THE CROSS-CLAIMS OF LAWRENCE WAREHOUSE COMPANY ARE BARRED BY THE STATUTE OF LIMITATIONS (C.C.P. SEC. 337(1)).

Generally no cause of action accrues for breach of an obligation to indemnify against damages or loss until payment has been made by the indemnitee. The cause of action may accrue earlier as in other obliga-

tions where there is an anticipatory breach by repudiation.

Wahl v. Cunningham, 320 Mo. 57, 6 S.W. 2d 576 at 580 (1928).

Similarly it has been held that the effect of Rules 13(g) and 14(a) of the Federal Rules of Civil Procedure permitting cross-claims against one who is or may be liable to the cross-claimant, is to accelerate the accrual of causes of action for indemnification where such procedures are utilized.

Greenleaf v. Huntingdon & B. T. M. R. & Coal Co., 3 F.R.D. 24 (E.D. Pa. 1942).

Admittedly under either of these grounds the cause of action is accelerated only at the option of the indemnitee, but such option is exercised, however, as in the instant action, by commencing an action.

Crown Prod. Co. v. Cal. Food Etc. Corp., 77 C.A.2d 543 at 551, 175 P.2d 861 (1947).

Clearly Capitol repudiated any liability to Lawrence in its answer to Lawrence's cross-claim filed May 18, 1944 (Exhibits D, E; R. 352-354 in 13840). Thus the cross-claims in No. 30473 on the same cause of action are barred because they were filed more than four years after May 18, 1944.

California Code of Civil Procedure, Sec. 337(1).

There is no question of concealment of the possible liability of the transferees because Lawrence was placed on notice of the transfer at the trial of the

deny that its own negligence contributed to the loss for which it seeks recovery. Under the law generally the evidence, consisting of the judicial admissions of Lawrence and the uncontradicted testimony of James A. Kenyon, requires that Lawrence be denied indemnification because its own negligence contributed to its loss. No evidence was offered or, if offered, could have been admitted, against these appellants to show that Capitol incurred some liability to Lawrence. Therefore, the judgment in No. 30473 must be reversed with directions to enter judgment for appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

Dated, San Francisco, California,
September 22, 1953.

Respectfully submitted,
HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

No. 13,840

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANT CAPITOL CHEVROLET COMPANY.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
Crocker Building, San Francisco 4, California,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Pacific Mutual Building, Los Angeles 14, California,
Attorneys for Appellant
Capitol Chevrolet Company.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 13,840

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vs.

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Appellee.

BRIEF FOR APPELLANT CAPITOL CHEVROLET COMPANY.

JURISDICTIONAL STATEMENT.

An action, Civil Action No. 23171, was commenced on February 16, 1944, by the Defense Supplies Corporation, an agency of the United States in which the Government of the United States owned more than one half the capital stock, against Lawrence Warehouse Company, Capitol

Chevrolet Company, a California corporation, Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore. More than $3,000 was involved in the controversy. The foregoing averments are contained in the complaint, Paragraphs I and II (R. 3-4 of 11418). The jurisdiction of the District Court of the claim of Defense Supplies Corporation is founded on 28 United States Code, sections 1331, 1345 and 1349.

The cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company, Clyde W. Henry and Constantine Parella, as well as other cross-claims not directly involved in this appeal, were filed in the same action (No. 23171) as that in which the complaint of Defense Supplies Corporation was filed. The cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company is the claim involved in this appeal. These cross-claims were filed pursuant to Rule 13(g), Federal Rules of Civil Procedure, and arose out of the same transaction or occurrence, i.e., the destruction of certain tires averred to belong to Defense Supplies Corporation, that was the subject matter of the complaint of Defense Supplies Corporation and are ancillary to the complaint (R. 45-48 in 11418).

Coastal Air Lines v. Dockery, 180 F.2d 874 (8th Cir. 1950);

Lawrence v. Great Northern Ry. Co., 98 F.Supp. 746 (D.C.Minn. 1951);

United States Fidelity & Guaranty Co., v. Janich, 3 F.R.D. 16 at 19 (S.D. Cal. 1943).

The cross-claim of Lawrence Warehouse Company in No. 23171 was consolidated for trial with its cross-claims

in No. 30473. A judgment in favor of Lawrence Warehouse Company in both actions was "entered" on February 12, 1953. On March 10, 1953, Capitol Chevrolet Company filed its appeal from that judgment.

No judgment has been entered determining Lawrence Warehouse Company's cross-claims in No. 23171 against Clyde W. Henry and Constantine Parella. Similarly, there has been no determination of the cross-claims of Capitol Chevrolet Company against the same parties. Nor has there been a determination under Rule 54(b), Federal Rules of Civil Procedure, that there is no just reason for delay in entering the judgment appealed from and a direction for its entry.*

Capitol Chevrolet Company suggests, therefore, on this appeal, that under section 1291, 28 United States Code, its appeal might be dismissed. This anomalous suggestion of Capitol Chevrolet Company as appellant results from the District Court's holding that the judgment in No. 23171 against Capitol Chevrolet Company, made simultaneously and in one document with the judgment against cross-defendants in No. 30473, was binding on the defendants in No. 30473 and was in fact the basis for the judgment in No. 30473 (R. 29 in 13840). Defendants and appellants in No. 30473 contend that the judgment against Capitol Chevrolet Company in No. 23171 was not final and therefore not *res adjudicata* or an estoppel as to them. The court below having held to the contrary, appellants in No. 30473 (who were not defending for Capitol Chevrolet Company and did not appear at the trial of the com-

*Such determination and direction were entered in No. 30473 (R. 179 in 13840).

plaint of Defense Supplies Corporation) have no alternative but to prosecute this appeal in behalf of Capitol Chevrolet Company to obtain the reversal of the judgment on the merits, thereby reversing the judgment against them in No. 30473.

Of course, if the Court of Appeals dismisses this appeal for the reason that the judgment against Capitol Chevrolet Company is not final, the judgment against appellants in No. 30473 must be reversed, the basis for that judgment disappearing.

STATEMENT OF THE CASE.

The principal questions for decision in this case are:

1. Whether the judgment appealed from can be a final judgment when it appears that additional claims in the same action have not been adjudicated and that no determination and no direction under Rule 54(b) have been made.

2. Whether the District Court's findings are "clearly erroneous," the findings being to the effect that appellee's negligence did not contribute to the loss for which it was awarded indemnification.

3. Whether the District Court could ignore the judicial admissions of appellee and the prior judicial determination against appellee that appellee's negligence contributed to the loss for which it was awarded indemnification.

4. Whether the District Court deprived appellant of its day in court on the issues raised in appellee's cross-claim by admitting in evidence in the trial of the cross-

claim and considering on those issues evidence which had been adduced on a separate trial in the same action of different and distinct issues raised by the complaint of Defense Supplies Corporation and answers thereto of appellant, appellee and others.

On October 1, 1942, Lawrence Warehouse Company (hereinafter called "Lawrence") and Capitol Chevrolet Company (hereinafter called "Capitol") entered into an agency agreement for the storage of automobile tires and tubes (Ex. 11, R. 341 in 11418). In this agreement Capitol agreed:

> "3. To store and safeguard the storage of such tires and tubes as are received by Agent [Capitol].
> * * * * * * *
> 8. To indemnify the Principal [Lawrence] against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth."

Thereafter Capitol stored the tires delivered to it by Lawrence and belonging to Defense Supplies Corporation in eleven different warehouses belonging to Capitol in Sacramento (R. 110 in 11418; R. 362 in 13840). On March 1, 1943, Lawrence and Defense Supplies Corporation entered into a new agreement for the storage of tires in a building called the Ice Palace (Ex. 1, R. 310 et seq. in 11418). On March 1, 1943, under Lawrence's direction Capitol entered into a lease of the Ice Palace from Clyde W. Henry, its owner (Ex. 6, R. 321 et seq. in 11418) and subsequent thereto removed some of the tires and tubes of Defense Supplies Corporation to the Ice Palace. Watchmen were maintained for the Ice Palace by

Lawrence (R. 351-352; 365-366 in 13840). On April 9, 1943, V. J. McGrew, an independent contractor, commenced use of an acetylene torch in an engine room adjacent to the Ice Palace to the knowledge of the watchmen (R. 280-281 in 11418). As a result of McGrew's negligent use of the acetylene torch the Ice Palace burned destroying the tires and tubes.

On May 31, 1943, the stockholders of Capitol, who were James A. Kenyon and Adams Service Co., a corporation,* authorized its dissolution and agreed that upon the transfer to them of its assets, they would assume its liabilities (R. 159, 162 in 13840).

On June 1, 1943, Capitol filed its Certificate of Election to Dissolve with the Secretary of State (R. 357-359 in 13840). Prior to December 31, 1943, the assets of Capitol were distributed to its stockholders, James A. Kenyon and Adams Service Co., and on that date Capitol's Certificate of Winding Up and Dissolution was executed (R. 357-359 in 13840).

On February 16, 1944, Defense Supplies Corporation filed its claim in action No. 23171 for the loss of the tires and tubes against Lawrence, Capitol, Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore (R. 3 et seq. in 11418). It was averred that Capitol and Lawrence permitted V. J. McGrew to enter the premises with an acetylene torch (R. 8-9 in 11418). On May 8, 1944, Lawrence filed its answer to the complaint denying liabil-

*James A. Kenyon and Adams Service Co. are appellants and defendants in No. 30473. F. Norman Phelps and Alice Phelps, also defendants and appellants in No. 30473, are the stockholders of Adams Service Co. and were held liable for its obligations.

ity and its cross-claim against Clyde W. Henry, Constantine Parella and Capitol in which it sought judgment over for any liability which might be imposed upon it by reason of the complaint of Defense Supplies Corporation (R. 38 et seq. in 11418). On April 14, 1944, Capitol filed its answer to the complaint denying liability and its cross-claims against Clyde W. Henry and Constantine Parella in which it sought judgment over for any liability which might be imposed on it by reason of the complaint of Defense Supplies Corporation (R. 10 et seq. in 11418). On May 18, 1944, Capitol filed its answer to the cross-claim of Lawrence denying any duty to indemnify Lawrence (R. 353-354 in 13840). Thereafter Constantine Parella and Clyde W. Henry filed their answers to the cross-claims of Lawrence and Capitol (R. 4 in 13840).

On February 13, 1945, to and including February 15, 1945, a trial occurred at which plaintiff Defense Supplies Corporation and defendants Lawrence, Capitol, Henry, Elmore, Parella and McGrew appeared. Capitol was represented by Attorneys A. J. Getz, Esq., and Cameron B. Aikens, Esq. (R. 60 in 11418). At the close of plaintiff's case all the defendants moved to dismiss (R. 308-309 in 11418) and the case was submitted on said motions (R. 309 in 11418). Plaintiff did not oppose Parella's motion to dismiss, and it was granted.

At the trial on February 13, 1945, James A. Kenyon was called as a witness for plaintiff under Rule 43(b), Federal Rules of Civil Procedure. According to his testimony and a statement there made by his attorney in the presence of the attorney for Lawrence, Capitol had theretofore been dissolved (R. 354-356 in 13840).

On January 9, 1946, the Court rendered its opinion (67 F.Supp. 16) to the effect that judgment be entered in favor of plaintiff against defendants Lawrence, Capitol and McGrew and in favor of defendant Henry against plaintiff for costs. In this opinion the court stated (R. 75 in 11418):

> "The Court will retain jurisdiction to determine the issues of the cross-actions, if the parties therein concerned determine to pursue the same."

On February 20, 1946, the Court made substantially the following order (R. 4 in 13840):

> "Feb. 20, 1946.
>
> Goodman, J. ordered findings prepared in main case; further ordered hearing on cross-complaints dropped from calendar to be restored on motion of interested parties."

On April 15, 1946, the court filed written Findings of Fact and Conclusions of Law and rendered a judgment in accordance with its opinion. The judgment was against Lawrence, Capitol and McGrew, jointly and severally (R. 83-84 in 11418).

Lawrence and Capitol appealed from this judgment and the judgment was affirmed on appeal (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 164 F. 2d 773 (9th Cir. 1947)).* Subsequently, Lawrence and Capitol moved the Court of Appeals to vacate the affirmance and to remand the action to the District Court with instructions to dismiss. The ground of the motion

*The record on that appeal, No. 11418, has by stipulation and order been made a part of the record on this appeal, No. 13840 (R. 442-444 in 13840).

was that Defense Supplies Corporation had been dissolved on June 30, 1945, and hence, when the District Court had rendered judgment on April 14, 1946, it had lost its jurisdiction. This motion was granted by the Court of Appeals (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 168 F. 2d 199 (9th Cir. 1948)). On certiorari, the Supreme Court held that, while the appeal from the judgment of the District Court had abated on July 2, 1946, the judgment was valid when entered and could be sued upon by the successor of Defense Supplies Corporation, the Reconstruction Finance Corporation (*Defense Supplies Corp. v. Lawrence Warehouse Co.,* 336 U.S. 631 (1949)).

On April 12, 1951, Reconstruction Finance Corporation filed its complaint in No. 30473 against Capitol Chevrolet Company, Lawrence Warehouse Company, James A. Kenyon, Capitol Chevrolet Co. (to be distinguished from Capitol Chevrolet Company), V. J. McGrew and Seaboard Surety Company, the surety on Lawrence's supersedeas bond in No. 23171 (R. 38 et seq. in 13840). The complaint in No. 30473 was based on the judgment in No. 23171; James A. Kenyon and Capitol Chevrolet Co. were averred to be liable for the obligations of Capitol Chevrolet Company (R. 41-43 in 13840). In the second action, No. 30473, Lawrence again cross-claimed against Capitol Chevrolet Company and against James A. Kenyon and Capitol Chevrolet Co. (R. 55 et seq. in 13840). Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. denied liability on the claim of Reconstruction Finance Corporation (R. 45 et seq. in 13840) and on the cross-claims of Lawrence (R. 98 et seq. in 13840).

On March 7, 1951, H. C. Alphson, Esq., and Dempsey, Thayer, Deibert & Kumler were substituted as attorneys for Capitol in No. 23171 (R. 4 in 13840).

On November 20, 1951, the court granted summary judgment in favor of Reconstruction Finance Corporation in No. 30473 against Lawrence, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, jointly and severally, in the amount of the judgment in favor of Defense Supplies Corporation ($42,171.70) plus interest and costs (R. 81-83 in 13840).

On February 15, 1953, Lawrence filed an amendment to its cross-claim in No. 30473 naming as additional cross-defendants Adams Service Co., J.A.K. Co., F. Norman Phelps and Alice Phelps (R. 113 et seq. in 13840). F. Norman Phelps and Alice Phelps filed their answers to this cross-claim on March 5, 1952 (R. 147 et seq. in 13840), and while it has been contended that Adams Service Co. was neither served nor appeared, the court held that Adams Service Co. appeared and defended on the merits (R. 134-136 in 13840). No question is raised on this issue in the appeal of Adams Service Co.

On March 4, 1952, on motion of Lawrence and in confirmation of a minute order entered on January 9, 1952, the court ordered that the "above-captioned actions [No. 23171 and No. 30473] be consolidated for trial on March 5, 1952" (R. 18 in 13840).

On March 3, 1952, Capitol filed its first amended answer to the cross-claim of Lawrence in No. 23171 denying liability and setting up affirmative defenses based on the acquiescence and contributory negligence of Lawrence (R.

10 in 13840). On this appeal it is urged that the court erred in finding that Capitol breached any duty to Lawrence and in not finding in favor of the affirmative defenses.

At the consolidated trial of the cross-claims, Lawrence introduced no evidence on the issue of whether its liability to Defense Supplies Corporation or to Reconstruction Finance Corporation, was caused by some breach of duty by Capitol to Lawrence other than the evidence which had been previously introduced at the trial of the claim of Defense Supplies Corporation on February 13, 1945, to and including February 15, 1945 (R. 316-317 in 13840).* Objection was made to the admission and consideration of this evidence at that time (R. 317 et seq. in 13840) and, pursuant to stipulation, the court at that trial reserved to Capitol leave to file a motion to strike all said evidence (R. 322, 323 in 13840). This motion was filed (R. 19 et seq. in 13840) and was apparently denied (Order for Judgment, R. 29 in 13840; Conclusions, R. 130 in 13840) although the court did not observe that the motion was made by Capitol (Conclusions, R. 130 in 13840). It is urged on this appeal that the court erred in admitting and considering this evidence.

On September 12, 1952, the court entered its order for judgment in favor of Lawrence on its cross-claim in No. 23171 against Capitol (R. 24 et seq. in 13840). In No. 30473 it ordered judgment in favor of Lawrence on its cross-claims against James A. Kenyon and Adams Service

*This evidence was not offered against the cross-defendants in No. 30473.

Co. but ordered the cross-claims dismissed as to F. Norman Phelps, Alice Phelps, Capitol Chevrolet Company, J.A.K. Co. and Capitol Chevrolet Co. (R. 24 et seq. in 13840). On January 15, 1953, it amended its order for judgment by ordering judgment in favor of Lawrence in No. 30473 against F. Norman Phelps and Alice Phelps (R. 30 et seq. in 13840).

On February 11, 1953, Findings of Fact and Conclusions of Law were filed as one document entitled in both actions, No. 23171 and No. 30473 (R. 117 et seq. in 13840). A judgment also entitled in both actions was filed on February 11, 1953, in favor of Lawrence against Capitol (in No. 23171) for the sum of $76,269.73 representing the amount paid by Lawrence to Reconstruction Finance Corporation, Lawrence's costs and attorneys' fees, and interest (R. 131 et seq. in 13840). It is from this judgment that this appeal is taken (R. 33 in 13840).

SPECIFICATION OF ERRORS.

1. The Judgment, Findings of Fact (Findings, Nos. V, VI, VII, XIII, XVII, XVIII, XIX, XX, XXII, and XXIII, R. 119 et seq. in 13840), and Conclusions of Law (Conclusions, Nos. I and II, R. 128-130 in 13840) are unsupported by the evidence and are clearly erroneous because:

(a) The evidence admitted and considered by the Court clearly shows that any negligence of Capitol to Defense Supplies Corporation was known to and expressly directed by Lawrence;

(b) The evidence admitted and considered by the Court clearly shows that Lawrence's action of admitting McGrew to the Ice Palace and permitting the use of an acetylene torch therein was independent active negligence which was the proximate cause of the damage to Defense Supplies Corporation.

2. The Court erred in failing to hold that the Judgment, Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation are binding on Lawrence and demonstrate that Lawrence was actively negligent (Answer, R. 16-17 in 13840; Findings, No. XVI, R. 126 in 13840).

3. It was error to admit or to consider as evidence at the trial of the cross-claim of Lawrence the transcript of evidence and exhibits adduced at the trial of the complaint of Defense Supplies Corporation.

(This evidence is not here set out in full because it consists of practically the whole of the record on the former appeal in Action No. 23171. This evidence was reoffered at the trial of the cross-claims (R. 317 in 13840), but the Court may have considered this evidence to have been in the case on the issues raised in the cross-claim when originally offered (R. 29, 117). This was the *only* evidence offered to show that Capitol breached some duty to Lawrence.)

The grounds of objection to said evidence urged at the trial and in a motion to strike were the following (R. 317 et seq. in 13840; Motion to Strike, R. 19 et seq. in 13840):

(a) The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171

was limited, in so far as Capitol was concerned, solely to the issue of whether Capitol failed to perform some duty owed to Defense Supplies Corporation.

1. The Court made a judicial record on and final determination of this issue by its Judgment of April 15, 1946, and its Findings of Fact and Conclusions of Law of April 15, 1946.

(b) The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be utilized to show that Capitol failed to perform some duty it may have owed to Lawrence.

1. Evidence in a former trial is admissible against a party only if the party had the right to cross-examine on the issue in regard to which the evidence is offered.

(c) The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be introduced on the issue as to which it was originally offered because on that issue the Court has made a final determination.

1. A judicial record is the "best evidence" of a judicial determination.

2. The evidence adduced at the trial of the complaint of Lawrence in No. 23171 is "integrated" in a judicial record.

3. An unambiguous judicial record cannot be modified by extrinsic evidence.

4. A judicial record cannot be contradicted by extrinsic evidence that something different was intended.

5. A party who relies on a judicial record cannot impeach its recitals.

(d) The evidence offered at the trial of the complaint of Defense Supplies Corporation in No. 23171 is incompetent and inadmissible hearsay where now offered by Lawrence on the issues raised by the cross-claims and the answers of the cross-defendant.

1. Under California law to use the transcript of testimony at a former trial it is necessary to establish the unavailability of the witnesses whose testimony appears in the transcript.

2. Under Federal law the transcript of testimony given at a former trial is admissible, *if at all,* only where the unavailability of the witnesses whose testimony appears in the transcript is established.

4. The Court erred in finding (Findings, No. X, R. 123 in 13840) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence and cross-defendant Capitol in the amount of $42,171.70 plus interest at the rate of 7 per cent per annum from April 15, 1946, to and including November 21, 1951, and costs in the amount of $20.00, and in finding (Findings, No. XI, R. 123 in 13840) that on or about December 1, 1951, while said judgment was still in force and unsatisfied, cross-claimant, Lawrence, paid plaintiff Reconstruction Finance Corporation the

sum of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff because:

(a) Said judgment was not, and is not now, final but is subject to revision at any time, inasmuch as all the claims in Action No. 30473 have not been disposed of;

(b) No evidence was offered or admitted to show that the judgment in Civil Action No. 30473 in favor of Reconstruction Finance Corporation was based on the judgment in favor of Defense Supplies Corporation in Civil Action No. 23171, or that said judgment in Civil Action No. 30473 was paid by Lawrence.

5. For the foregoing reasons the Court erred in granting judgment in favor of Lawrence and in refusing to grant judgment in favor of Capitol (Conclusion, No. I, R. 128-129 in 13840).

SUMMARY OF ARGUMENT.

I. Unresolved doubt about the jurisdiction of this Court over this appeal prompts appellant to realize and suggest that this appeal might be dismissed.

II. The evidence precludes recovery by Lawrence Warehouse Company from Capitol Chevrolet Company.

A. It is not sufficient to show merely that Lawrence incurred a liability to Defense Supplies Corporation.

B. Any negligence of Capitol was known to and expressly directed by Lawrence.

(Lawrence expressly directed Capitol to remove the tires and tubes from Capitol's warehouses to the Ice Palace knowing of its fire hazards. Capitol had no knowledge of McGrew's entry or use of an acetylene torch.)

C. The independent active negligence of Lawrence caused the damage to Defense Supplies Corporation.

(The evidence and judicial admissions by Lawrence in its pleadings and by its counsel demonstrate that Lawrence employed and regularly maintained the watchmen who permitted and observed McGrew's entry with an acetylene torch.)

III. The Judgment and the Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation are binding on Lawrence Warehouse Company and demonstrate that Lawrence Warehouse Company was actively negligent.

A. In so far as Lawrence was concerned the ground of its liability (upon which depended its right to indemnity) was placed in issue, as a matter of law and as a matter of pleading, between Lawrence and Defense Supplies Corporation at the trial of the complaint in Action No. 23171.

B. The judicial record of the trial of the complaint in Action No. 23171 is conclusive on Lawrence.

IV. It was error to admit or to consider as evidence at the trial of the cross-claim of Lawrence Warehouse Company the transcript of evidence adduced at the trial of the complaint of Defense Supplies Corporation.

A. The evidence was not admissible and could not be considered to show that Capitol breached some duty to Lawrence.

B. The evidence was not admissible to show an alleged "true meaning" of the Judgment and Findings of Fact and Conclusions of Law.

V. Lawrence failed to prove any loss or damage.

(No evidence of payment of the judgments in favor of Defense Supplies Corporation or Reconstruction Finance Corporation was admitted. The judgment in favor of Reconstruction Finance Corporation is not final.)

ARGUMENT.

I. UNRESOLVED DOUBT ABOUT THE JURISDICTION OF THIS COURT OVER THIS APPEAL PROMPTS APPELLANT TO REALIZE AND SUGGEST THAT THIS APPEAL MIGHT BE DISMISSED.

The record shows that in Action No. 23171 Lawrence filed cross-claims against Clyde W. Henry and Constantine Parella (R. 45, et seq. in 11418) and that these cross-defendants filed answers to these cross-claims (R. 4 in 13840). Similarly, Capitol filed cross-claims against Clyde W. Henry and Constantine Parella which were answered (R. 4-5 in 13840). No adjudication of these cross-claims has been made; the only judgments rendered in the action do not refer to them (R. 83 in 11418; R. 81, 131 in 13840). Thus, under Rule 54(b), Federal Rules of Civil Procedure,

the judgment in Action No. 23171 from which this appeal is taken may not be final.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950).

Although this action was commenced prior to March 19, 1948, the effective date of the amendment to Rule 54(b), the judgment from which this appeal is taken was rendered on January 11, 1953 (R. 131 in 13840). This Court and the Court of Appeals for the Second Circuit have held that Rule 54(b), as amended, applies to a judgment rendered after the effective date of the rule even though the action was commenced before that date.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950);

Flegenheimer v. Manitoba Sugar Co., 182 F.2d 742 (2d Cir. 1950).

See, Rule 86(b), Federal Rules of Civil Procedure.

It may be that the District Court's determination and direction pursuant to Rule 54(b), although entitled only in Action No. 30473, could be construed to apply to the judgment in Action No. 23171 (R. 179 in 13840). If it is determined that Rule 54(b) applies to the judgment from which this appeal is taken, the proper procedure is to dismiss the appeal.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950).

Appellant Capitol raises this point because the only basis for the judgment against the cross-defendants in Action No. 30473 was this judgment against Capitol in Action No. 23171 (R. 29 in 13840). Appellants in No.

30473 contend that they cannot be bound by this judgment because it was not final at the time of trial.

Merriam v. Saalfield, 241 U.S. 22, 28 (1916).

If this judgment is not even now final, then not only must this appeal be dismissed, but the judgment against appellants in No. 30473 must be reversed.

II. THE EVIDENCE PRECLUDES RECOVERY BY LAWRENCE WAREHOUSE COMPANY FROM CAPITOL CHEVROLET COMPANY.

Appellant contends that, as a matter of law, it was error for the court to admit or consider as evidence at the trial of the cross-claim of Lawrence the evidence adduced at the trial of the complaint of Defense Supplies Corporation. This court, however, may not have to decide that point, for if that evidence is considered, it shows that Lawrence is not entitled to indemnity from Capitol.

A. IT IS NOT SUFFICIENT TO SHOW MERELY THAT LAWRENCE INCURRED A LIABILITY TO DEFENSE SUPPLIES CORPORATION.

A brief statement of the law of indemnity is necessary prior to analyzing the evidence. First, and foremost, there is no right of indemnity or contribution in California between joint tort-feasors.

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379 (1912).

In the agreement between Lawrence and Capitol made before Capitol stored the tires and tubes in its own warehouse (R. 341 et seq. in 11418), Capitol agreed:

"8. To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth."

On its face the agreement provides for indemnity only for the acts or the failures to act of Capitol. Further, this court has held that unless the indemnitor is an insurance company, such agreements will not be construed to provide for indemnification for independent negligent acts or negligent nonaction of the indemnitee.

United States v. Wallace, 18 F. 2d 20 (9th Cir. 1927).

In fact, such an agreement would not even preclude Capitol from indemnification by Lawrence for Lawrence's wrongful acts exposing Capitol to liability.

Washington & Berkeley B. Co. v. Pennsylvania S. Co., 215 Fed. 32 (4th Cir. 1914).

The agreement between Lawrence and Capitol created the status of principal (Lawrence) and agent (Capitol). As between principal and agent the following are the rules of indemnity:

1. The principal is primarily liable to a third person and not entitled to indemnification from his agent for his own independent negligent acts.

Green v. Southern Pacific Co., 53 C.A. 194 at 201, 199 Pac. 1059 (1921), hearing in Supreme Court denied;

1 Mechem, *Agency* (2d ed. 1914) Sec. 1287.

2. The principal is primarily and jointly liable to a third person and is a joint and concurrent tort-

feasor, and not entitled to indemnification for the directed negligent acts of his agent.

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918).

3. The principal is secondarily liable and entitled to indemnification only for the undirected negligent acts of the agent done within the scope of the agent's authority.

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

4. The agent is entitled to indemnification from the principal for negligent acts of the agent directed by the principal.

Bradley v. Rosenthal, 154 Cal. 420 at 424, 97 Pac. 875 (1908);

1 Mechem, *Agency* (2d ed. 1914) Sec. 1603.

This is true even where the agent has agreed to indemnify the principal for the agent's negligent acts.

Horrabin v. City of Des Moines, 198 Iowa 549, 199 N.W. 988 (1924).

Another situation, not limited to the principal-agent relationship, arises where one party is "passively" negligent and the other is "actively" negligent. In such situations some courts require the party "actively" negligent to indemnify the party "passively" negligent. Recently this court so applied the law of Oregon.

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950).

This rule, however, has not been adopted by the California Supreme Court and was expressly rejected in,

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379 (1912).

There, Justice Melvin, speaking for the court, stated (162 Cal. 138-139):

> "Both companies were liable, but appellant insists that it was only passively guilty of a tort and that therefore it comes within an exception to the general rule above stated. With this view we cannot agree. It was the separate duty of each to take thorough precautions. Any accident due to neglect of such duty made the corporations jointly liable."

and (p. 140):

> "The law being thus settled in California, we need not examine the decisions in other states, wherein the general rule which we have been discussing is given many shades of variation and exception."

It must be remembered that in analyzing the rule applied in the *Booth-Kelly Lumber Co.* case supra, this court referred to section 95 of the *Restatement of Restitution* where the rule is expressed as follows (p. 415):

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition."

From the foregoing it is clear that, even if the law of California is not adopted, to be indemnified by Capitol Lawrence must show that the tires and tubes of Defense Supplies Corporation were destroyed by the action or nonaction of Capitol which it did not direct and in which it did not acquiesce. As a matter of defense, Capitol can show that some negligent act by Lawrence caused the destruction of the tires and tubes.

B. ANY NEGLIGENCE OF CAPITOL WAS KNOWN TO AND EXPRESSLY DIRECTED BY LAWRENCE.

There is no conflict in the evidence on this issue of fact. Most of the evidence on this issue was introduced by Capitol at the second trial on March 5, 1952. Without conflict the evidence shows that the following occurred:

After Lawrence and Capitol entered into the agency agreement for the storage of tires and tubes on October 1, 1942 (R. 341 et seq. in 11418), Capitol stored the tires and tubes delivered to it by Lawrence and belonging to Defense Supplies Corporation in eleven different warehouses in Sacramento (R. 362 in 13840). Mr. Wallace, attorney for Lawrence, stated at the trial of the complaint of Defense Supplies Corporation (R. 110 in 11418):

> "Now, in this particular Capitol Chevrolet arrangement, if my memory is correct, I think the Reconstruction Finance Corporation anticipated when this program started that there would be about 10,000 tires stored in Sacramento. Arrangements were made with the Capitol Chevrolet Company to store that comparatively small number. Prior to the time that they hired this Ice Palace they already had eleven

> warehouses in Sacramento, in every conceivable kind of a vacant space; there was something like 100,000, so it was then decided to consolidate the tires in this big building that was called the Ice Palace, and that building was used as a consolidation warehouse."

It was during this period of time that Capitol was directed to permit only employees of Defense Supplies Corporation to enter the premises (Ex. 9, R. 339-340 in 11418). Undoubtedly if the tires and tubes had been destroyed during this period the provisions of the agency agreement would have applied to make Capitol solely liable. Subsequently, however, the tires and tubes were removed to a different place of storage, the Ice Palace, at which place there was a modification of the duties of Capitol and Lawrence. This fact was irrelevant and therefore not presented on the prior appeal.

Prior to the leasing of the Ice Palace, representatives of Lawrence, Capitol and Defense Supplies Corporation inspected it and knew of its fire hazards (R. 368 et seq. in 13840). Capitol did not desire to consolidate the storage of the tires in the Ice Palace, but was directed to do so by Lawrence (R. 363-366 in 13840). Also, prior to the leasing of the Ice Palace, Lawrence undertook to maintain watchmen for the Ice Palace (R. 365-366 in 13840). On March 1, 1943, Lawrence and Defense Supplies Corporation entered into an agreement for storage of tires at the Ice Palace; Capitol was not a party to this agreement (R. 310 et seq. in 11418). On March 1, 1943, Capitol entered into a lease of the Ice Palace with Henry and Parella (Ex. 6, R. 321 et seq. in 11418). Lawrence maintained watchmen for the Ice Palace (R. 193 in 11418).

There can be no dispute as to the foregoing evidence. The following paragraph may be disputed. It relates to whether Gordon Kenyon,* an employee of Capitol, permitted or knew of McGrew's entry into the Ice Palace (Findings, No. V, R. 119 in 13840). Appellant contends that its version is supported by all the evidence and that the District Court's version was clearly erroneous. Fairness requires appellant to point out that this court stated in its opinion on the former appeal (164 F.2d 773 at 777):

> "Moreover, it was Capitol, not the guard, who permitted McGrew to enter and pursue his work in the building. Kissell's presence did not preclude vigilance on Capitol's part or, indeed, render its exercise any the less imperative since Kissell [the guard] acted in the matter under Capitol's direction and had no apparent reason to suppose that McGrew's use of the torch was unauthorized."

Henry, one of those authorized by Defense Supplies Corporation to enter the Ice Palace (Ex. 10, R. 340 in 11418), gave written authorization to Mr. Sanchez, his employee, to enter the Ice Palace and there to remove some pipe. Mr. Henry testified (R. 176-178 in 11418):

> "Q. [by Mr. Miller for Defense Supplies Corporation] What was the arrangement?
>
> A. The answers that I gave in this deposition are information that I had received from my superintendent, Mr. Sanchez, and I gave those as facts, because he had told them to me. So far as my giving either Mr. Sanchez or Mr. McGrew specific instructions to go and see some person, I did not

*Gordon Kenyon is not to be confused with James A. Kenyon, appellant in Action No. 30473.

give those specific instructions, and when you asked me if I asked Mr. Gordon Kenyon for permission to go in that Ice Palace, I did not. However, in conversation with Mr. Sanchez I understand that he went to Mr. Kenyon, whatever Mr. Kenyon was that had authority to give permission, and he received permission for Mr. McGrew to go in and get this tank out. Does than [sic] answer your question?

* * * * * * *

Mr. Miller. Q. I will call your attention again to the note that you identified reading: 'Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer Mr. Tony Sanchez to enter with his two men to remove pipe and equipment.'* I will ask you again if that authorization was written by you.

A. Yes, it was.

Q. And was that for the purpose of Mr. Sanchez going to the Ice Palace to remove the machinery and and equipment from the engine room?

A. I answered that once before, but I will be glad to answer it again. That was given a week previous, at least a week previous, to this April 9, [the date of the fire] but it was given to Mr. Sanchez to give the watchman at the Ice House to take out approximately 80 feet of 12-inch casing that was in there that we wanted, but it had nothing whatever to do with the getting out of this brine tank.

Q. So it is now your testimony that you never sent anyone there to take the brine tank out?

A. That is very technical. You are trying to confuse me. I explained that at quite some length, and I will be glad to explain it again.

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*This writing was the only knowledge Capitol had of an entry into the Ice Palace. It does not mention McGrew or an acetylene torch.

The Court. I think I understand the testimony. We do not have to go over it again. We will take a recess at this time for a few minutes."

and (R. 180-181 in 11418):

"Mr. Glicksberg [for defendants Henry and Elmore, lessors of Ice Palace]. Q. Just one or two questions. Mr. Henry, all of these questions propounded to you by counsel pertaining to the deposition and the answers you gave therein, were they correct?

A. Well, both answers are correct, as far as I know.

Q. What do you mean by 'both answers are correct'?

A. I mean if there is any variance between the answers that I gave in that deposition and the answers I gave here, they are largely technical, because after some of the technical points brought out this morning I wondered if I had given the right answers when I said as a fact in my deposition information that had been given me.

Q. But a great many of those questions were directed to your giving of a card. Did that card have anything to do with any of the subject matter of the case at the time of the fire?

A. No.

Q. All of the answers which pertain to your giving of a card and permission of individuals to go in had to do with some other subject?

A. The card was given to Mr. Sanchez so that he could take his men and go and get a length of 12-inch pipe out of there for the use of the water company, and it had nothing whatever to do with Mr. McGrew entering the premises.

Q. And all of the answers that were read by counsel pertained to that particular card and that section of 12-inch pipe?

A. That is correct."

On a different occasion Henry orally authorized V. J. McGrew, an independent contractor, to enter the engine room of the Ice Palace and there to remove a brine tank. Henry testified (R. 165-168 in 11418):

"Mr. Miller. Q. On or about April 9, 1942, or shortly before that date, did you send a Mr. McGrew to the Ice Palace to take out a bronze tank in this engine room?

A. You mean 1942 or 1943?

Q. 1943?

A. No, I did not.

Q. What was your relationship with Mr. McGrew?

A. Mr. McGrew was a contractor whom I had employed over a period of about eight years drilling wells for me.

Q. Was he working for you in April, 1943?

A. He had a contract with me in April, 1943.

Q. What was that contract for?

A. For drilling wells.

Q. Do you know a Mr. Sanchez?

A. Yes.

Q. Does Mr. Sanchez work for you?

A. Yes.

Q. Do you know a Mr. Elmore?

A. Yes.

Q. Did Mr. Sanchez and Mr. Elmore both work for you in April, 1943?

A. Yes.

Q. Did you send either one or both of those men to the Ice Palace to remove this brine tank?

A. No.

Q. Did you send anyone there to remove the brine tank?

A. No.

Q. Did you request Capitol Chevrolet Company for permission for anyone to go upon these premises and remove this brine tank?

A. No.

Q. Did you send Mr. Sanchez down to the Capitol Chevrolet Company with a card from you asking that he be permitted to go upon the premises and remove machinery and equipment, or the brine tank?

A. No.

Q. Do you ever recall writing a note or memorandum which reads, 'Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer, Mr. Tony Sanchez, to enter with his two men to remove pipe and equipment.'?

A. Yes, I remember writing that card.

Q. Did you give that card to Mr. Sanchez?

A. Yes, I did.

Q. Did you then send him to the Ice Palace?

A. I directed him to go to the Ice Palace with that card.

Q. With that card?

A. Yes.

Q. And the two men that you mention in that card were Mr. Elmore and Mr. McGrew?

A. Mentioned in what?

Q. In this writing in which you state, 'Please allow bearer, Mr. Tony Sanchez, to enter with his two men.'

A. No.

Q. What two men did that refer to?

A. The two men that Mr. Sanchez might have had.

Q. Mr. Sanchez was at that time employed by you?

A. That is right.

Q. What was his position with you?

A. Superintendent of the waterworks.

Mr. Glicksberg. At this time may we have a foundation laid as to the time and place of this card? I think it is quite material.

The Court. All right. I thought he had asked that.

Mr. Glicksberg. Not as to the time it was given.

Mr. Miller. Q. I will ask you now, Mr. Henry, when was that card given Mr. Sanchez?

A. Oh, I would say probably around April 1, as close as I could estimate.

Q. Of 1943?

A. That is correct.

Q. Do you know if Mr. Sanchez went to the Ice Palace?

The Court. I think the witness said a moment ago he did not give the card, and then he changed his testimony.

Mr. Glicksberg. No, I do not think there is any such thing as the witness changing his testimony.

The Court. He may have misunderstood the other question.

Mr. Glicksberg. That is why I asked to have the foundation laid. I thought myself counsel was directing the witness' attention to a day prior to the fire. It might have been a week or ten days prior thereto.

Mr. Miller. Q. Then it is your testimony that on or about April 1, 1943 you sent Mr. Sanchez down to the Ice Palace to remove the machinery and equipment from the engine room; is that correct?

A. That is not correct. I sent Mr. Sanchez about April 1 to get a pipe out of the Ice Palace.

Q. Did you ever send Mr. Sanchez down to take anything out of the engine room?

A. No.

Q. Did you ever send Mr. McGrew down to take anything out of the engine room?

A. No.

Q. Did you ever make any arrangement with Mr. McGrew to remove the tank from the engine room?

A. I will have to answer that question by explaining the circumstances."

Gordon Kenyon was presented with only one request to enter the Ice Palace, whether written or oral, and that request was the written request above referred to. Gordon Kenyon's testimony was as follows (R. 185-189 in 11418):

"Q. [by Mr. Miller for Defense Supplies Corporation] Were you assistant manager of the Capitol Chevrolet Company in April 1943?

A. Yes.

Q. Do you recall, Mr. Kenyon, giving authority to anyone to go upon the premises known as the Ice Palace in west Sacramento to remove any machinery or equipment therefrom?

A. I at one time recall a Mr. McGrew asking for permission, asking me to O.K. permission to enter property, to go into the Ice Palace.

Q. Do you recall the name of the person who sent you that card?

A. I think the card was from Clyde Henry—it was signed by Mr. Henry.

Mr. Miller. Do you happen to have the original of that card?

Mr. Getz [for Capitol] I have it, counsel. I will produce it in just a moment.

Mr. Miller. I wish to proceed with some questions while you are looking at it.

Q. Did you know the man who presented you with that card?

A. I did not.

Q. Do you remember the name of the man who came to you with the card?

A. The card showed the man's name was Mr. Sanchez.

Q. You didn't know Mr. Sanchez otherwise?

A. No.

Q. Did you instruct the guard at the Ice Palace to permit Mr. Sanchez to go into the premises and remove any equipment?

A. I think I did. I can't be positive.

The Court. Q. You mean you don't recall distinctly?

A. I don't recall distinctly, no. Let me put it this way: I do not recall how I gave him authority to go in, whether it was by telephone or by written correspondence.

Q. Either one way or the other?

A. I did it one way or the other.

By Mr. Miller:

Q. When you say 'one way or the other,' you mean you don't recall whether it was written or oral?

A. That is right.

Q. Do you know if the man went out to the Ice Palace and went into the engine room and removed any equipment?

A. Lately, you mean?

Q. After you gave him authority to enter or instructed the guard to let him enter, do you know if he went there?

A. Just by hearsay.

Q. I will show you this—it is a business card of the U. S. Machinery Company, and printed down in the left-hand corner, 'Clyde W. Henry,' and I ask you to look at the reverse side. There appears on the reverse side, 'Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer Mr. Tony Sanchez to enter with his two men to remove pipe and equipment. Clyde Henry.' Is that the card which was presented to you?

A. Yes.

Mr. Miller. I ask that that be admitted in evidence.

Mr. Wallace [for Lawrence] Is there any testimony as to when this card was presented to him?

Mr. Miller. I will ask him.

The Court. It may be admitted and marked.

(The card was marked Plaintiff's Exhibit No. 8 in evidence.)

By Mr. Miller:

Q. I will ask you, Mr. Kenyon, do you recall when that card was presented to you?

A. I think in my deposition it was a Monday prior to the fire, prior to the date the fire happened.

Q. What day of the week was the fire?

A. I don't recall.

Mr. Getz. Let us be clear on that. I have a newspaper clipping of Saturday, April 10, giving the story of the fire, so April 9 must have been Friday.

The Court. Q. It was the Monday before Friday, April 9?

A. Yes.

By Mr. Miller:

Q. To the best of your recollection, it was Monday before that Friday that you either called or notified the watchman to let these people in pursuant to this card that you received from Mr. Henry, is that correct?

A. That is right.

Q. After you had made arrangements with the guard to let these men go on the premises, did you attempt to find out or did you go out there to see what they were doing?

A. No.

Q. So that as far as you know, do you know they went out and got into the premises?

A. Just by hearsay.

Q. When you say 'by hearsay,' what do you mean?

A. By a report from my foreman.

Q. Did your foreman report to you that they went in?

A. The foreman told me that they went in and tried to get through to the engine room, so-called, and they were unable to, and they went out of the building.

Q. What day was that, do you recall?

A. I don't recall.

Q. That was after you had given them authority to go out there?

A. Yes.

Q. At any later time did your foreman report as to any work they were doing?

A. I don't know.

Q. When did you first learn that these men had gone out and started to remove a brine tank from the engine room?

Mr. Wallace. I do not want to object——

Mr. Miller. The card is there. Refer to it. It says 'pipe and equipment.'

Mr. Wallace. There is not any evidence, as I understand it, yet that the men referred to on this card are the men even that went into the engine room, and if I understood Mr. Henry's testimony, it was

that they were not the same men. I don't know whether there were two sets of men or not, but apparently the evidence today would indicate there were.

The Court. Is there an objection?

Mr. Miller. I will withdraw that question and restate it, and maybe we can get the facts."

and again (R. 194-196 in 11418):

"Q. [by Mr. Getz for Capitol] At the time that card was handed to you, was anything whatsoever said to you about any brine tank?

A. No.

Q. Did you know anything about any brine tank?

A. No.

Q. Did you ever know anything about a brine tank until after this fire?

A. I did not.

Q. Did you ever know or have any reason to believe that they would enter the engine room for the purpose of using an acetylene torch or any kind of a torch in there?

A. The card read 'pipe and equipment,' and the pipe was in the main building, and there was also equipment such as barrels—small equipment.

Q. Did that require any torch or any use of an acetylene torch for the purpose of removing it?

A. There was no torch or anything mentioned about a torch to me in any way.

Q. Did you ever hear of Mr. McGrew prior to the time of the fire?

A. I did not.

Q. Had you had any dealings with him?

A. No.

Q. Or authorized Mr. McGrew to enter into the building?

A. I did not.

Q. You said that the foreman informed you that they could not get into the engine room. Wasn't that because the tires were stacked against that door between the main building and the engine room?

A. That is correct.

Q. Were there any tires stored in the engine room?

A. No.

Q. There was never any intention of storing any tires in the engine room?

A. No.

Mr. Getz. That is all.

The Court. Is there anything else?

By Mr. Glicksberg [for Henry and Elmore]:

Q. With respect to that card which was introduced in evidence here as Plaintiff's Exhibit 8, I think on direct examination you testified that it was given to you Monday prior to the day of the fire. How do you recall that date?

A. I really cannot recall, but I think there was some reason for my remembering it was on a Monday.

Q. Do you know Mr. Sanchez?

A. No.

Q. Would you be able to recognize him if you saw him?

A. Somebody told me he was in court here.

Mr. Glicksberg. Mr. Sanchez, will you stand up?

Q. Do you recognize him now?

A. No, I can't say that I do.

Q. You don't know of your own knowledge whether that card was given to you the week of the fire or the Monday prior to the fire?

A. It was given to me on a Monday before the Friday of the fire—there was about four days elapsed.

Q. I am asking you, how do you know it was four days or ten days?

A. I could not tell you right now, but there was a reason for it someplace.

Q. What is the reason?

A. I don't know.

Q. Then it might as well be ten days before the fire?

A. No, it could not have been. I don't recall the day.

Q. You don't know?

A. No."

From the foregoing it is apparent that while Gordon Kenyon thought he had authorized McGrew's entry he was in error because he did not know, and could not have known, that Henry had authorized two entries, one of the Ice Palace and one of the connecting engine room. This explains Gordon Kenyon's confusion as to dates. The card presented to Gordon Kenyon did not mention McGrew.

From an evidentiary standpoint the evidence which makes the court's interpretation clearly erroneous is the testimony of V. J. McGrew. McGrew testified (R. 209-211 in 11418):

"Mr. Lombardi [for Defense Supplies Corporation]. Q. Now, at the time you first started work at the Ice Palace on this particular job, who did you have with you to assist you in the work?

A. I had Mr. Elmore.

Q. Did anybody else come with you at the time you went to the Ice Palace?

A. I either went to the Ice Palace with Mr. Sanchez or I followed him over. It might have been that he might have driven over in his own car and I drove over myself.

Q. Did anyone give you permission to go on the premises for the purpose of doing this work?

A. Mr. Sanchez did, yes.

Q. Mr. Sanchez?

A. Yes.

Q. Do you know who Mr. Sanchez is?

A. He is manager or superintendent of the West Sacramento Water Company.

Q. When you first went to the Ice Palace to do this work, did you see any of the guards there?

A. I seen them, but I didn't talk to them.

Q. Did the guards permit you to go on the premises?

A. They did not stop me.

Q. Had you gone to the Ice Palace for the purpose of starting this work prior to April 8, 1943?

A. I believe we were over there twice, yes.

Q. You were there?

A. I was there, yes.

Q. What did you do at that time?

A. I did not do anything at that time. I believe Mr. Sanchez talked to the guard, and the guard required additional information or additional authority.

Q. When was that?

A. That was, I think, the day before; that would be the 7th.

Q. Then you went to the Ice Palace, but you did not start any work at that time?

A. I did not start any work, and I do not believe I even went into the building or even close to the building."

and (R. 253-255 in 11418):

"Q. [by Mr. Getz for Capitol]. When was the first time that you went to the Ice Palace in connection with the removal of any equipment or steel pipe?

A. The first time I went there, I believe, was either the 6th or 7th.

Q. Either the 6th or the 7th?

A. Yes.

Q. You went with Mr. Sanchez. You said Mr. Sanchez was there, didn't you?

A. Yes.

Q. Now, then, on that day did you go into the main building?

A. No.

Q. Did you ask permission to go in the main building?

A. I at no time asked permission personally to go into that building.

Q. Did you at any time get permission from anybody to go into that building, or the engine room?

A. You mean personally?

Q. Yes.

A. No.

Q. You do know that when you went down the 7th the guard told you you could not go in without further authority?

A. I believe he told Mr. Sanchez; he did not tell me. Mr. Sanchez told me.

Q. You understood that Mr. Sanchez had permission, but you don't know that of your own knowledge, do you?

A. I did not personally go with him, no.

Q. You don't know from whom, if at all, he obtained any such permission, do you?

A. That is right.

Q. Do you know whether or not Mr. Sanchez had been there at the building and removed some pipe a short time before that?

A. No, I don't know that, either.

Q. When you entered the engine room you entered it from the outside of the main building, didn't you?

A. Yes.

Q. And you did not at any time contact or have anything to do with anyone there employed by the Capitol Chevrolet Company?

A. No, I didn't have anything to do with them.

Q. At no time in all of your dealings at the Ice Palace did you have any contact of any kind with anyone from the Capitol Chevrolet Company: Is that right?

A. No, I didn't personally know any of them.

Q. And this enterprise that you were engaged in had no connection whatever with the Capitol Chevrolet Company, did it?

A. Not to my knowledge.

Q. You were never employed or retained or contacted with by the Capitol Chevrolet Company?

A. No.

Q. You were not engaged in anything for their benefit?

A. Not to my knowledge."

From a legal standpoint the conclusion which makes the court's findings "clearly erroneous" is the conclusion absolving Henry from liability to Defense Supplies Corporation (R. 82 in 11418). If the fire was caused by the only entry of which Gordon Kenyon had knowledge, that of Sanchez on Henry's business to remove pipe, then Henry would have been liable to Defense Supplies Corporation. Judgment on the complaint of Defense Supplies Corporation was rendered in favor of Henry (R. 84 in 11418). Gordon Kenyon's authorization of Sanchez's entry could impose no liability on Capitol because such

did not cause the fire and he could not have ascertained from him that at a later time Lawrence's watchman would permit McGrew to enter the engine room with acetylene equipment. Furthermore, there is absolutely no evidence that prior to the fire Gordon Kenyon or anyone connected with Capitol had any knowledge that an acetylene torch was being used or would be used in the Ice Palace; the only one who had this knowledge was Kissell, who was employed by Lawrence.

The foregoing analysis shows that the only failure of Capitol to safeguard the storage of the tires occurred in storing the tires and tubes in the Ice Palace; this act was not only acquiesced in but directed by Lawrence. In so far as Defense Supplies Corporation is concerned, Capitol failed in its nondelegable duty as a custodian of the tires to safeguard the tires by failing to keep McGrew from using his acetylene torch in the adjacent premises. The following discussion will show that as between Lawrence and Capitol, this duty was undertaken by Lawrence several months after the agency agreement was executed and before Capitol agreed to remove the tires and tubes from its own premises.

C. THE INDEPENDENT ACTIVE NEGLIGENCE OF LAWRENCE CAUSED THE DAMAGE TO DEFENSE SUPPLIES CORPORATION.

It has previously been stated that Lawrence undertook to provide and did provide watchmen for the Ice Palace. The evidence on this is the following. Gordon Kenyon testified (R. 193 in 11418):

> "Q. [by Mr. Getz for Capitol]. Did the Defense Supplies Corporation also place guards in that palace?

A. There were guards placed there by the Lawrence Warehouse Company.

Q. Were they allowed to enter the Ice Palace?

A. The guards were allowed to, yes."

The guard, Kissell, testified and counsel stated as follows (R. 284-286 in 11418):

"Cross-Examination.

Mr. Getz. Q. Mr. Kissell, do you know who engaged the Burns Detective Agency to guard this Ice Palace?

A. I don't know positively, no.

The Court: Is there any dispute about that, who employed the Burns Detective Agency?

Mr. Miller [for Defense Supplies Corporation]. I understand there may be, but I didn't think there was.

Mr. Getz. Perhaps counsel will stipulate. Is it stipulated that the Burns Detective Agency was hired at the instance and request of the Defense Supplies Corporation through the Lawrence Warehouse Company, that is, the Lawrence Warehouse Company actually made the arrangements and the Defense Supplies Corporation paid the cost of that guarding?

Mr. Miller. No, that is not true. The Defense Supplies Corporation did not pay the Burns Detective Agency for guarding.

Mr. Getz. They reimbursed the Lawrence Warehouse Company for the cost of the guarding.

Mr. Miller. We will stipulate that the guards were employees of the Burns Detective Agency; that arrangements were made with the Burns Detective Agency by the Lawrence Warehouse Company at the request of the Defense Supplies Corporation; that the Burns

Detective Agency was paid by Lawrence Warehouse Company, and that Defense Supplies Corporation reimbursed the Lawrence Warehouse Company for the cost of the guard service. Is that correct?

Mr. Getz. Is it further stipulated that the duties of the guards were prescribed by the Defense Supplies Corporation and transmitted through the Lawrence Warehouse Company?

Mr. Miller. No, it is not so stipulated. I do not understand that to be the fact.

Mr. Getz. Is it stipulated that the number of guards and the number of hours of work were prescribed by the Defense Supplies Corporation?

Mr. Miller. No, that is not our understanding.

Mr. Wallace [for Lawrence]. Let me see if I can clarify the situation. The Defense Supplies Corporation requested a 24-hour guard established. They did not prescribe the hours of any particular guard; they just wanted 24-hour guard service. The Lawrence Warehouse Company employed the Burns Detective Agency and paid them, and the Defense Supplies Corporation reimbursed Lawrence Warehouse Company.

The Court. Does that clear that up?

Mr. Getz. Yes. Will you stipulate that the Capitol Chevrolet Company had nothing to do with the hiring of the guards or the prescribing of their duties?

Mr. Miller. I don't know.

Mr. Wallace. There is one further thing. I think the Burns Detective Agency as a guard was approved by the RFC.

Mr. Miller. We will stipulate the RFC approved the Burns Detective Agency as an agency.

Mr. Getz. Q. Now, Mr. Kissell, you were not in any way employed by the Capitol Chevrolet Company, were you?

A. No.
Q. They had no authority over you whatsoever?
A. No."

More conclusive is an extract from the answer of Lawrence to the complaint; this portion of the answer was read into the record on the consolidated trial of the cross-claims of Lawrence on March 5, 1952 (R. 351-352 of 13840); also the answer is verified under oath by the secretary of Lawrence. It reads as follows:

> "Incident to said storage and the rental of said premises, plaintiff directed that this defendant employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff."

Thus Lawrence cannot deny and has judicially admitted that after the execution of the agency agreement by Lawrence and Capitol on October 1, 1942, the duties of the parties were modified. Capitol provided the place of storage and Lawrence undertook to provide watchmen to safeguard the storage.

The evidence is clear that Lawrence, not Capitol, was reimbursed by Defense Supplies Corporation for employing the watchmen (R. 286 in 11418). At the trial of the complaint of Defense Supplies Corporation, Lawrence contended that this reimbursement had the effect of making Lawrence's watchmen the watchmen of Defense Supplies Corporation (Opinion, R. 72 in 11418). In its opinion the court avoided this question by stating in a footnote (R. 72 in 11418) (67 F.Supp. p. 21, n. 3):

> "The evidence indicates that the armed guard service was purely an additional and independent protective activity to prevent pilferage of the tires."

This footnote is not only entirely without evidentiary support but is contrary to human experience.

The Findings of Fact and Conclusions of Law and the Judgment rendered on the complaint of Defense Supplies Corporation, it will subsequently be shown, are consistent only with the court's holding that these employees of Lawrence were actively negligent.* This question is, however, conclusively answered on the evidence by a portion of the verified answer of Lawrence read into evidence at the trial of the cross-claims on March 5, 1952 (R. 352 in 13840); the answer states:

> "* * * that said watchman was under the direction and control of plaintiff and was so maintained to protect plaintiff's tires and tubes from loss or damage by fire and from theft, or other loss; * * *."

The testimony of the watchman, W. R. Kissell, is also conclusive on this question; he testified (R. 280-282 in 11418):

> "Q. [by Mr. Miller for Defense Supplies Corporation]. Do you recall on April 9, 1943, seeing some workmen working in the engine room at the Ice Palace?
>
> A. Yes.
>
> Q. Did you permit them to go in there?
>
> A. They had a permit, I did not do the permitting; that is, there was an order left there for them

*See pages 50-54 of this Brief.

to go to work. I did not stop them. I allowed them to go to work that morning.

Q. What time did you go on duty?

A. At eight o'clock.

Q. Were they working when you came on duty?

A. Yes, they were.

Q. You say there was an order. What do you mean by that?

A. There was an order came from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room.

Q. Did that appear in your book of instructions, or whatever you kept there?

A. That was our orders, not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company.

Q. While you were on duty that day and before 12:30 did you have occasion to go back to the engine room and observe this work?

A. I went back, around 11:30, I would say.

Q. What was happening when you went in there at 11:30?

A. Well, one man was just standing there, and another man was using an acetylene torch.

Q. What was he doing with the acetylene torch?

A. He was cutting a piece of steel or sheet metal.

Q. Did you have occasion to look around the engine room at that time and observe the condition of the floor and the rest of the room?

A. I was not inside of the building, I was just to the door.

Q. Did you look in the door?

A. Just in the door, yes.

Q. What did you see on the floor?

A. Well, I did not see much of anything on the floor, with the exception of one thing, on the northeast corner of this tank he was cutting on.

Q. What did you see there?

A. It looked to me just like, well, there was some dark material just under the edge of the tank.

Q. Did you say anything to the man at that time?

A. Well, I said something to the man who was standing there, I asked him to be sure and be cautious about fire, watch for fire, and he said they were.

Q. This, you say, was about 11:30?

A. Somewhere around there.

Q. What did you do then?

A. I went back. I went back into the front part of the building.

Q. When did you first learn that a fire had started?

A. Well, approximately, I would say, just about 12:30."

The watchman obviously considered it within his duties to watch for fire. The foregoing is all the evidence on the question of the duties of the watchmen; it shows beyond question that their duties included protecting the premises from fire. The quoted testimony also shows that Lawrence's watchman disobeyed his instruction, for it was not Henry or Sanchez but McGrew, an independent contractor, who was in the engine room.

Thus, as between Lawrence and Capitol, the only one who had knowledge of McGrew's entry and use of an acetylene torch was Lawrence's agent. There is no finding of the court below expressly to the contrary, although the court did find generally against the defenses of con-

tributory negligence (R. 125 in 13840). The specific finding of negligence on the part of Capitol is as follows (R. 119-120 in 13840):

> "That on or about April 9, 1943, while tires and tubes belonging to plaintiff, Defense Supplies Corporation, were so stored in said Ice Palace, Capitol Chevrolet Company negligently consented to and approved the entry of one V. J. McGrew into said 'Ice Palace' and its attached engine and boiler room without ascertaining his intentions. That at said time and place said cross-defendant Capitol Chevrolet Company negligently failed to maintain adequate safeguards against fire."

Accepting this finding it would nevertheless appear that McGrew was an efficient intervening cause in so far as Capitol is concerned for Gordon Kenyon had no reason to believe that McGrew would enter the Ice Palace, much less that he would use an acetylene torch or create a fire hazard. Also he could rely on Lawrence performing its duty to safeguard the Ice Palace. At most Capitol's negligence could be "passive." Lawrence's negligence was on the contrary obviously "active," for the above-quoted testimony shows a direct and conscious breach of its duty to Capitol which it undertook after the agency agreement was executed.

The foregoing evidence is unequivocal; it is not directly contradicted by the findings; it shows conclusively that only Lawrence knew of McGrew's entry with an acetylene torch. Inasmuch as the wrongful acts of Lawrence were not covered by Capitol's indemnity agreement, Lawrence is clearly not entitled to indemnification under the law

previously set forth. This is true even if, as found by the District Court, Capitol was negligent and failed to perform its duty of providing a safe place of storage for the tires and tubes.

III. THE JUDGMENT AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RENDERED ON THE COMPLAINT OF DEFENSE SUPPLIES CORPORATION ARE BINDING ON LAWRENCE WAREHOUSE COMPANY AND DEMONSTRATE THAT LAWRENCE WAREHOUSE COMPANY WAS ACTIVELY NEGLIGENT.

The Judgment and the Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation were introduced in evidence at the trial of Lawrence's cross-claims on March 5, 1952 (Exs. A, B; R. 347-348 in 13840).

A. IN SO FAR AS LAWRENCE WAS CONCERNED, THE GROUND OF ITS LIABILITY (UPON WHICH DEPENDED ITS RIGHT TO INDEMNITY) WAS PLACED IN ISSUE, AS A MATTER OF LAW AND AS A MATTER OF PLEADING, BETWEEN LAWRENCE AND DEFENSE SUPPLIES CORPORATION AT THE TRIAL OF THE COMPLAINT IN ACTION NO. 23171.

From the standpoint of the pleadings it is clear that Lawrence intentionally placed in issue the ground of its liability upon which depended its right to indemnity. The complaint of Defense Supplies Corporation contains no averment of a principal-agent relationship between Lawrence and Capitol. On the contrary it avers the joint and concurrent negligence of Lawrence in substantially the same wording as is found in the Findings of Fact and Conclusions of Law rendered on the complaint of

Defense Supplies Corporation (R. 348-349 in 13840). The answer of Lawrence to the complaint of Defense Supplies Corporation, however, expressly tendered the issue of whether Lawrence was primarily or secondarily liable; in fact the cross-claim asserted against Capitol, averring that Capitol was the sole custodian of the tires and tubes, was expressly pleaded by way of answer to the complaint of Defense Supplies Corporation (Ex. D; R. 350-351 in 13840).

Furthermore, the judicial record of the trial of the complaint of Defense Supplies Corporation shows that Lawrence was actively negligent and primarily liable to Defense Supplies Corporation so as to preclude any right to indemnity. That record is inconsistent with the contention that Lawrence was only secondarily liable. The judgment in favor of Defense Supplies Corporation plainly states that Lawrence and Capitol are jointly and severally liable to Defense Supplies Corporation (R. 83-84 in 11418). Under California law a principal is only secondarily liable for the undirected torts of his agent and is not a joint tort-feasor if his liability is predicated solely upon *respondeat superior.*

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918);

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908);

Fimple v. Southern Pacific Co., 38 C.A. 727, 177 Pac. 871 (1918).

In California a joint judgment against tort-feasors precludes contribution or indemnity.

Adams v. White Bus Line, 184 Cal. 710 at 713-714, 195 Pac. 389 (1921).

In jurisdictions which recognize a right to indemnity by one passively negligent from one actively negligent, such right does not exist where the wrongdoers are *jointly* liable and where their acts *join* and concur to cause damage. In *Maryland Casualty Co. v. Frederick Co.,* 142 Ohio St. 605, 53 N.E. 2d 795 (1944), the Supreme Court of Ohio held that one passively negligent was entitled to indemnity from one actively negligent but expressly pointed out that they were not joint tort-feasors.

The Findings of Fact and Conclusions of Law by the court, rendered on the complaint of Defense Supplies Corporation, unequivocally state that the negligent *acts* of Lawrence contributed to the damage of Defense Supplies Corporation and that the *acts* of Lawrence and Capitol concurred and joined together to cause the damage (R. 80-81 in 11418). Finding, No. VI states (R. 81 in 11418):

> "VI.
>
> The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

Finding, No. VII states (R. 81 in 11418):

> "By reason of said negligent acts of Defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15."

Under California law the artfully precise language of these findings bars Lawrence from asserting that its lia-

bility was founded solely on the doctrine of *respondeat superior.*

Salter v. Lombardi, 116 C.A. 602, 3 P.2d 38 (1931), hearing in Supreme Court denied;

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918), involved a personal injury action against the Southern Pacific Company and its "motorneer." A verdict was returned against the company, no mention being made of the motorneer; and for this reason the company appealed from the judgment entered on the verdict. The court affirmed the judgment on the ground that the verdict was based upon joint liability and concurrent negligence as distinguished from a *respondeat superior* theory of liability (177 Cal. 779-780).

The federal courts in California have held that under California law a principal is not jointly liable with an agent if the principal's liability is based solely on *respondeat superior* although they may be joined in the same action.

Stephens v. Southern Pac. Co., 16 F.2d 288 (N.D. Cal. 1926);

La Flower v. Merrill, 28 F.2d 784 (N.D. Cal. 1928).

As a matter of law, the ground of Lawrence's liability, upon which its right to indemnity depended, was placed in issue at the trial of the complaint of Defense Supplies Corporation. The possibility of exoneration of Lawrence if Capitol were found not to be negligent, placed in issue

the question of whether Lawrence was primarily liable on a theory other than *respondeat superior.*

Bradley v. Rosenthal, 154 Cal. 420 at 426, 97 Pac. 875 (1908);

Fimple v. Southern Pacific Co., 38 C.A. 727 at 729-730, 177 Pac. 871 (1918).

It follows, therefore, that the record of the action which Lawrence relies on to prove Capitol's liability, establishes that Lawrence's independent negligence contributed to the loss for which recovery was awarded to Lawrence.

B. THE JUDICIAL RECORD OF THE TRIAL OF COMPLAINT IN ACTION NO. 23171 IS CONCLUSIVE ON LAWRENCE.

As a matter of evidence, the plain and unambiguous judicial record can neither be contradicted nor explained by extrinsic evidence or a court's opinion.* A judicial record is defined as follows (C.C.P., sec. 1904):

> "A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding."

As a matter of law, the determination of the primary and active negligence of Lawrence in the judicial record of the trial of the complaint estops Lawrence from showing otherwise. Recently this court held that under Oregon law one could not urge a judgment as an estoppel unless it was a party to the prior proceeding.

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F. 2d 902 (9th Cir. 1950).

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*This point is further discussed under Point IV (Brief, pp. 57-66).

Of course, Capitol in the instant case was a party to the prior proceeding, but under the law of California it is only necessary that the one *against* whom the estoppel is asserted must have been a party to the prior action.

Bernhard v. Bank of America, 19 Cal. 2d 807 at 811-813, 122 P. 2d 892 (1942).

Also the California cases which permit actions over by a principal against an agent in the same action in which they are sued by third persons, hold the parties to be estopped by the record in that action.

Salter v. Lombardi, 116 C.A. 602, 3 P. 2d 38 (1931), hearing in Supreme Court denied;

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

See,

Adams v. White Bus Line, 184 Cal. 710 at 713-714, 195 Pac. 389 (1921).

Salter v. Lombardi, 116 C.A. 602, 3 P. 2d 38 (1931), hearing in Supreme Court denied, was an action in tort against several persons. The plaintiff recovered judgment against all defendants. One defendant paid one-half the judgment and his attorney, for reasons not here relevant, paid the other half, an assignment of the judgment being taken. Lewis, one of the defendants, sought to have full satisfaction of the judgment entered, but the court entered only a partial satisfaction. Lewis appealed and the appellate court affirmed on the ground that to the extent of the amount contributed by the attorney there was a valid assignment of the judgment. It was contended by the respondent on appeal that because

Lewis' liability was primary and that of the codefendants was based solely on *respondeat superior,* Lewis was not entitled to have satisfaction in any amount entered. In denying this argument the court stated (p. 604):

> "With appellant's basic premise we are agreed, that the judgment is one against joint tort-feasors. His motion for full satisfaction was made in part upon the record and files of the action. This lays before us the findings of fact upon which the judgment was founded, where it is finally adjudicated, so far as this case is concerned, that 'defendants *by themselves,* their agents, employees and servants' acted so negligently that plaintiff had judgment. In the face of this finding, plaintiff's successor in interest may not be heard to say that the tort was solely that of defendant Lewis, and that Lewis' co-defendants were liable only on the theory of *respondeat superior.* We must consider the judgment as one against tort-feasors."

Referring again to this court's decision in *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 183 F. 2d 902 (9th Cir. 1950), there is no conflict in the decisions generally as to the effect of a prior adjudication of negligence against a party seeking indemnity. In the *Booth-Kelly Lumber Co.* case the party *against* whom indemnity was sought relied on the former proceedings, and this court held those proceedings not to be determinative. A contrary result is reached where, as in the instant case, the party seeking indemnity relies on the former proceedings.

> *Builders Supply Co. v. McCabe,* 336 Pa. 322, 77 A. 2d 368 (1951), containing an analysis of the leading cases.

The only possible way that Lawrence can avoid the effect of the prior adjudication of its active negligence is to show that its primary or secondary negligence was not an issue at the trial of the complaint of Defense Supplies Corporation. As shown above, Lawrence expressly pleaded this issue in its answer to Defense Supplies Corporation (R. 45-48 in 11418). If, however, liability as between Lawrence and Capitol was not in issue at the first trial, then the court was in error in considering at the trial of the cross-claims the evidence adduced at the first trial on that issue.

IV. IT WAS ERROR TO ADMIT OR TO CONSIDER AS EVIDENCE AT THE TRIAL OF THE CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY THE TRANSCRIPT OF EVIDENCE ADDUCED AT THE TRIAL OF THE COMPLAINT OF DEFENSE SUPPLIES CORPORATION.

The only evidence adduced at the trial of the cross-claim of Lawrence against Capitol to show that Capitol breached some duty to Lawrence was the evidence previously adduced at the trial of the complaint. There is some question as to whether the court considered the evidence as being reintroduced at the trial of the cross-claim (R. 317 in 13840), or whether it considered that evidence adduced at the trial of the complaint was somehow in the action on all issues (R. 29, 117 in 13840). Clearly the transcript of testimony (and the Exhibits authenticated thereby) could not have been reintroduced because Lawrence made no attempt to show the unavail-

ability of the persons whose testimony was offered. This is indisputably the law in California.

California Code of Civil Procedure, Sec. 1870 (8);

Gordon v. Nichols, 86 C.A.2d 571 at 576, et seq., 195 P.2d 444 (1948), petition for hearing by Supreme Court denied;

and in the Federal Courts:

Federal Rules of Civil Procedure, Rule 43(a);

Great Northern Ry. Co. v. Ennis, 236 Fed. 17 at 25, et seq. (9th Cir. 1915);

United States v. Aluminum Co. of America, 1 F.R.D. 48 at 50 (S.D.N.Y. 1938).

A. THE EVIDENCE WAS NOT ADMISSIBLE AND COULD NOT BE CONSIDERED TO SHOW THAT CAPITOL BREACHED SOME DUTY TO LAWRENCE.

It is equally clear that the court was erroneous in declaring that the evidence adduced at the trial of the complaint was "already" in evidence upon the issues raised by the cross-claims. It is fundamental in an adversary proceeding that evidence can be considered against a party only as to issues on which the party has a right to cross-examine.

Industrial Products Mfg. Co. v. Jewett, 15 Fed. Rules Serv. 43a.3,Case 1, (S.D. Iowa 1951);

California Code of Civil Procedure, Sec. 1870 (8);

Werner v. State Bar, 24 C.2d 611 at 616, 150 P.2d 892 (1944).

In so far as Capitol was concerned the only issues on the trial of the complaint were whether it breached some duty to Defense Supplies Corporation and the amount of

damage caused thereby. The issue on the trial of the cross-claims was whether Capitol had breached some duty to Lawrence, which thereby caused it to incur liability to Defense Supplies Corporation. Thus, in order to consider as evidence on the cross-claims the evidence adduced at the trial of the complaint (seven years before), this court must hold that the issues raised in the cross-claims were then in issue. This is patently not the case.

When Defense Supplies Corporation presented its case, it would not have been permissible for Capitol to object, cross-examine and present additional evidence on the issue of whether Capitol was directed by Lawrence to do the acts in question, on the issue of whether Lawrence had assumed nondelegable duties of Capitol and on other issues arising between Lawrence and Capitol. These matters would have been irrelevant, confusing and embarrassing to Defense Supplies Corporation's case because they would not have constituted a defense to Defense Supplies Corporation's claim.

Bradley v. Rosenthal, 154 Cal. 520, 97 Pac. 875 (1908).

Undoubtedly the issues between Capitol and Lawrence were beyond the scope of cross-examination of witnesses called by Defense Supplies Corporation (Rule 43, F.R. C.P.). Conclusive on this question are the facts that Defense Supplies Corporation was the only party to put on its case in the first trial and that the action was submitted on motions to dismiss its complaint (R. 308-309 in 11418). The cases clearly establish that evidence adduced on the plaintiff's case against codefendants or against

an indemnitee in an action in which the indemnitor is held to be bound is limited to the issues between the plaintiff and the defendant or defendants.

The leading case on this question is *Washington Gas Co. v. Dist. of Columbia,* 161 U.S. 316 (1895). This was an action in which the District of Columbia sought recovery over against the Gas Company as a result of personal injury caused by an open gas box placed and maintained in the sidewalk by the Gas Company. Judgment in favor of the person injured had been recovered against the District and the Gas Company had been notified and given an opportunity to defend the action, as a result of which the judgment in that action was held to be binding upon the Gas Company. At the trial of the District's action against the Gas Company the District introduced independent evidence of the Gas Company's duty to maintain the gas box and of its failure in that duty. One of the questions raised on appeal was whether it was proper for the trial court to admit testimony of one Smith which had been adduced in the personal injury action. On this question Justice White stated for the court (p. 331):

> "As to the first of these two contentions, the trial court instructed the jury that, although the judgment in the first action was binding on the Gas Company, it was not conclusive as to the negligence of that company, but that such negligence could be inferred by the jury from the testimony of Smith, thus treating that testimony as possessing intrinsic proving power. Both these rulings were erroneous. The testimony of Smith taken in the first suit was *res inter alios,* and therefore incompetent against the Gas

> Company as independent testimony. The fact that it was admissible for the purpose of determining the scope of the thing adjudged in the suit in which it was given, did not justify its being used for a distinct and illegal purpose. Error, however, in this particular was in no sense prejudicial if the judgment in the first action conclusively established the negligence of the Gas Company."

In the case at bar, appellants do not deny that the judgment in favor of Defense Supplies Corporation establishes Capitol's negligence to Defense Supplies Corporation; they do deny that the judgment and the evidence in that case could establish that Capitol breached any duty to Lawrence.

In seeking recovery over against an alleged indemnitor, an indemnitee must introduce additional evidence on the issue of the indemnitor's breach of duty to the indemnitee.

City of Seattle v. Shorrock, 100 Wash. 234, 170 Pac. 590, 593 (1918);

Boston & M. R. R. v. Sargent, 72 N.H. 455, 57 Atl. 688 (1904).

An analogous case is *Wolf v. United Air Lines,* 12 F.R.D. 1 (M.D. Pa. 1951). That was an action under the Pennsylvania Survival Statute against United Air Lines for the death of plaintiff's decedent while a passenger in an airplane owned and operated by the defendant. Prior to the trial, the plaintiff moved to permit the use of depositions of certain witnesses in actions by other persons against the same defendant which arose out of the same airplane crash in which plaintiff's decedent

was killed. In the other actions the Douglas Aircraft Co. was also joined as a defendant and United Air Lines had filed cross-claims against Douglas. The district court denied the motion on the grounds that the issues and parties in the action in which the depositions were taken were not identical with those in the instant action. In pointing out the differences in issues, Chief Judge Watson emphasized that the issues raised by the cross-claims had so "overshadowed" the plaintiff's claim that it would be improper to permit the use of the depositions. That this difference in issues was clearly recognized by counsel in the instant case is disclosed in the following statements by counsel for Lawrence at the trial of the cross-claims (R. 314-315 in 13840):

> "Mr. Garrison. We are in this position: We have a case, 23171, that case right there, which had a complaint filed, an answer filed, and cross-claims filed. Your Honor passed and decided on the principal complaint, and the cross-claims have never been decided, and they were specifically reserved, as I understood it, for trial at a later date. So we have a cross-claim in that case which has never been decided and the issues have never been litigated. What we are doing now is proceeding to complete that trial and try the cross-complaint."

At this point it should be emphasized that statements in the opinions of the trial court and the Court of Appeals rendered on the trial and the appeal of the complaint of Defense Supplies Corporation which may have indicated that Lawrence was liable to Defense Supplies Corporation solely on a theory of *respondeat superior,* furnished no basis for an appeal by Capitol. The basis of

Lawrence's liability was certainly not in issue as to Capitol, just as Capitol could not have defended by showing that Lawrence had undertaken some of the nondelegable duties which Capitol, as custodian of the tires, had assumed to Defense Supplies Corporation.

Nothing is established by simply stating that the claim of Defense Supplies Corporation and the various cross-claims were consolidated or tried together because in that situation evidence in one action is evidence in the other only if the parties so agree or the court so orders before the trial.

> *National Nut Co. v. SuSu Nut Co.*, 61 F. Supp. 86 (N.D. Ill. 1945).

The only order in the instant action with reference to the cross-claims was entered *after* the trial on February 20, 1946; it states substantially as follows (R. 4 in 13840):

> "Feb. 20, 1946.
>
> Goodman, J. ordered findings prepared in main case; further ordered hearing on cross-complaints dropped from calendar to be restored on motion of interested parties."

Neither the foregoing order nor the statement in the court's opinion retaining jurisdiction of the cross-claims (R. 75 in 11418) could be, or was intended to be, a statement that the evidence offered in the trial of the complaint would be evidence on the issue of the liability between Lawrence and Capitol. Had the parties considered the trial in 1946 to be a trial of the cross-claims, it is inconceivable that Lawrence would have delayed seven years in having a judgment entered.

Actually, however, cross-defendants must be ultimately successful in obtaining judgment in this action whichever way the court rules on this question. To permit the introduction or use at the second trial of the evidence adduced at the trial of Defense Supplies Corporation's complaint on the issue of Capitol's liability to Lawrence, the court must hold that in the first trial the question of liability between Lawrence and Capitol was in issue as to Capitol. If it is true that this question was in issue as to Capitol, then this is an additional reason why the court must hold that this question was in issue as to Lawrence. As previously pointed out, if this question was in issue as to Lawrence, Lawrence is estopped by the adverse judicial record on that evidence. To hold Lawrence estopped on questions which it expressly placed in issue on the first trial is only to follow the course which Lawrence voluntarily adopted in its pleadings. To hold Capitol estopped on questions which it did not, and could not, place in issue is to deprive Capitol of its day in court.

B. THE EVIDENCE WAS NOT ADMISSIBLE TO SHOW AN ALLEGED "TRUE MEANING" OF THE JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Judgment, Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation were admittedly admissible and could be considered to show that Lawrence was liable to Defense Supplies Corporation and the amount of that liability. They could also be used to show that the dangerous condition of the Ice Palace and McGrew's use of an acetylene torch in the Ice Palace caused the loss. The transcript of evidence, however, could not be introduced or considered

to establish these same elements, much less other elements, of Lawrence's claim because of familiar rules of evidence.

The documents themselves are the "best evidence" of the judicial determination.

Sills v. Forbes, 33 C.A.2d 219 at 229, 91 P.2d 246 (1939), hearing in Supreme Court denied.

The evidence adduced at the trial of the complaint became "integrated" into the documents, the judicial record.

In re Crosby Stores, 65 F.2d 360 at 361 (2d Cir. 1933).

This judicial record could not be modified by extrinsic evidence.

Moore v. Harjo, 144 F.2d 318 at 321, et seq. (10th Cir. 1944).

Nor could it be contradicted by extrinsic evidence that something different was intended.

In re Crosby Stores, 65 F.2d 360 at 361 (2d Cir. 1933);

Louisiana Land & Exp. Co. v. Parish of Jefferson, 59 F.Supp. 260 at 266 (E.D.La. 1945).

Also, inasmuch as Lawrence relied on this judicial record to prove its liability to Defense Supplies Corporation, it could not impeach the recitals of the Judgment and the Findings of Fact and Conclusions of Law.

Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F.Supp. 308 at 313 (E.D. Wis. 1940).

The evidence adduced at the trial of the complaint of Defense Supplies Corporation was the only evidence offered at the trial of the cross-claims to show that Capitol

incurred any liability to Lawrence. Consequently, the exclusion of this evidence results in a clear failure on the part of Lawrence to establish any claim for relief. Inasmuch as objection to this evidence was made before the trial at the pretrial conference (R. 255 in 13840), during the trial (R. 315 et seq. in 13840) and after the trial but before judgment (R. 19 et seq. in 13840), Lawrence can claim no surprise at an adverse ruling on this appeal.

V. LAWRENCE WAREHOUSE COMPANY FAILED TO PROVE ANY LOSS OR DAMAGE.

Judgment was entered against Capitol in the principal sum of $68,294.15 together with interest in the amount of $7,975.58. Apparently this represents the amount paid by Lawrence to Reconstruction Finance Corporation, $58,859.90 (R. 123, 129 in 13840) plus attorneys' fees and costs of Lawrence, $9,439.25 (R. 123-124 in 13840). Lawrence, however, in introducing evidence of payment to Reconstruction Finance Corporation expressly limited that evidence to the cross-claims in Action No. 30473. Counsel stated (R. 343 in 13840):

> "Mr. Garrison [counsel for Lawrence]. Another item of stipulation, and then that is all of the evidence that we desire to offer. Counsel has agreed to stipulate that the judgment that was rendered in favor of the Reconstruction Finance Corporation against the defendants in 23171, Lawrence Warehouse Company, Capitol Chevrolet Company and McGrew, was paid upon December 1, 1951 by the Lawrence Warehouse Company, and that stipulation applies to both cases.

Mr. Clark [counsel for Capitol]. So stipulated.

Mr. Archer [counsel for Capitol]. So stipulated, Your Honor, although I would object to its admission in the first case as irrelevant.

Mr. Garrison. I am incorrect. It should apply only to the second case, because that is the case in which it was rendered.

The Court. Very well.

Mr. Garrison. That is the evidence on behalf of the cross-claimant.

I might say for the record that the amount of that judgment was $58,859.90."

Furthermore, Lawrence offered no evidence in this action that the judgment against it in favor of Reconstruction Finance Corporation in Action No. 30473 was based on the judgment against Lawrence in favor of Defense Supplies Corporation. If under some rule of law not apparent to appellant this fact could be judicially noticed, the court must also so notice that the judgment in Action No. 30473 against Lawrence in favor of Reconstruction Finance Corporation was not final at the time it was paid because the judgment expressly states that the cross-claims of Lawrence were still pending (R. 81 et seq.) and no determination or direction for entry under Rule 54(b) were made. Inasmuch as the claims of Reconstruction Finance Corporation in Action No. 30473 against James A. Kenyon and Capitol Chevrolet Co. have never been adjudicated, the judgment against Lawrence in favor of Reconstruction Finance Corporation is not even final at present but is "subject to revision at any time" (Rule 54(b), F.R.C.P.). Therefore, the payment to Reconstruction Finance Corporation by Lawrence was a voluntary

act not connected, in so far as the evidence is concerned, with the judgment against Lawrence in favor of Defense Supplies Corporation.

Also judicial notice would show that on February 11, 1953, a judgment was filed dismissing Lawrence's claim against Capitol in No. 30473 (R. 133 in 13840). This was a dismissal on the merits (Rule 41(b), F.R.C.P.), and the judgment has become final (R. 179 in 13840). Lawrence being a party to that judgment from which no appeal has been taken, it is estopped to assert Capitol's liability to Lawrence.

CONCLUSION.

If this appeal is not dismissed, appellant submits that the judgment appealed from must be reversed with directions to enter judgment for appellant. The undisputed evidence considered by the District Court shows that Lawrence undertook to provide watchmen to safeguard the Ice Palace and failed in the performance of this duty. The Findings of Fact, Conclusions of Law and Judgment rendered on the trial of the complaint of Defense Supplies Corporation estop Lawrence from contending otherwise. In addition, the evidence adduced at the trial of the complaint of Defense Supplies Corporation, regardless of its import, should not have been considered at the trial of the cross-claims on the issue of Capitol's liability to Lawrence. The exclusion of this evidence results in a failure of Lawrence to prove its case. For the foregoing reasons the judgment in favor of Lawrence

against Capitol must be reversed with directions to enter judgment for appellant.

Dated, San Francisco, California,
September 22, 1953.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant
Capitol Chevrolet Company.

No. 13,840

IN THE

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY,
a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

PETITION FOR REHEARING OR FOR A HEARING EN BANC.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
Crocker Building, San Francisco 4, California,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Pacific Mutual Building, Los Angeles 14, California,
Attorneys for Appellants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR REHEARING OR FOR A HEARING EN BANC.

To the Honorable William Healy, The Honorable Walter L. Pope and The Honorable Richard H. Chambers, Circuit Judges:

The appellants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and

Alice Phelps respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause or for a hearing *en banc* and in support of this petition represent to the Court as follows:

Appellants each reserve their argued positions as to each of the points of appeal, but in this petition address themselves to those features of the decision wherein they believe the Court may be convinced its result is based upon its application of incorrect legal principles which were not discussed in the briefs already presented to the Court.

Therefore, this petition is devoted to convincing this Court that it has erred in three respects:

1. The opinion of the Court is in error in that it fails to recognize that Lawrence Warehouse Company (hereinafter referred to as "Lawrence"), as a warehouseman, owed Defense Supplies Corporation the contractual and statutory duty of watching the tires stored in the Ice Palace.

2. The opinion of the Court is in error in that it fails to recognize that Lawrence's duty as a warehouseman to watch the tires in the Ice Palace was nondelegable and that this proposition is the law of the case.

3. The opinion of the Court is in error in holding that Defense Supplies Corporation's approval or consent to the selection of the Burns Agency relieved Lawrence of its duty to watch the tires in the Ice Palace.

POINT ONE.

THE OPINION OF THE COURT IS IN ERROR IN THAT IT FAILS TO RECOGNIZE THAT LAWRENCE WAREHOUSE COMPANY, AS A WAREHOUSEMAN, OWED DEFENSE SUPPLIES CORPORATION THE CONTRACTUAL AND STATUTORY DUTY OF WATCHING THE TIRES STORED IN THE ICE PALACE.

The opinion of the Court states (pp. 6-7):

> "If Lawrence without further qualifications had contracted with Defense Supplies to provide a 24-hour watch, it would appear that the case would fall within this exception, and that Lawrence would have been responsible to Defense Supplies for the negligence of Burns or its employee. But the contract between Lawrence and Defense Supplies did not require Lawrence to provide guards. The arrangement with the Burns Agency was made at the express request of Defense Supplies, for the latter's benefit and at its expense."

Appellants submit that the foregoing statements in the Court's opinion are in error in that under California statutes and the contract between Lawrence and Defense Supplies Corporation (hereinafter referred to as "Defense Supplies"), Lawrence was required to provide guards. There is a written contract between Defense Supplies and Lawrence dated March 1, 1943, which refers specifically in paragraph 1 to the storage of tires and tubes in the Ice Palace (Ex. 1, R. 310, *et seq.* in 11418). The contract provides in paragraph 5 that Lawrence is to be compensated for the storage of the tires. Paragraph 11 of the contract provides as follows (R. 313-314 in 11418):

> "11. Neither you nor Defense Supplies Corporation will be liable for failure to perform under this

agreement due to causes beyond the control and without the fault or negligence of the defaulting party, including, but not restricted to, acts of God or of the public enemy, acts or orders of the Government, floods, fires, strikes, freight embargoes and unavailability, or delays in the delivery of any material in the care for or servicing of tires or tubes stored or delivered hereunder. Your general responsibility for the care and protection of the tires will be limited to such care as is required by laws governing warehouses in your state and to the exercise of ordinary care on your part."

This contract between Lawrence and Defense Supplies refers to Lawrence's duties in regard to the tires and tubes stored in the Ice Palace, makes no mention of the Burns Agency and expressly incorporates the applicable statutes of the State of California. Even without an express provision, the parties would be held to have assumed the rights and duties prescribed by the California statutes unless they contracted to the contrary.

George v. Bekins Van & Storage Co., 33 C.2d 834, 848, 205 P.2d 1037 (1949).

The statutes applicable to the relationship between Lawrence and Defense Supplies are the following sections of the Civil Code:

Section 1852:

"*Degree of care required of depositary for hire.* A depositary for hire must use at least ordinary care for the preservation of the thing deposited."

Section 1858e:

"*Liability for loss by fire.* No warehouseman or other person doing a general storage business is

responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its protection and preservation."

*Section 1858.30:**

"[*Injury to goods.*] A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

There are many cases under these and similar statutes holding that evidence of failure to guard or watch inflammable goods in a warehouse is sufficient to show a breach of the statutory duty of a warehouseman.

Hanson v. Wells Van & Storage Co., 100 C.A.2d 332, 335, 223 P.2d 509 (1950) (petition for hearing by Supreme Court denied);

Hammond v. United States, 173 F.2d 860, 863 (6th Cir. 1949);

Price & Pierce v. Jarka Great Lakes Corporation, 37 F.Supp. 939, 943 (W.D. Mich. 1941);

Mexia Compress Co. v. Speight, 142 S.W.2d 439, 440 (Tex. Civ. App. 1940);

Alabam's Freight Co. v. Jiminez, 40 Ariz. 18, 9 P. 2d 194, 196 (1932).

In view of the foregoing statutes and cases and the written contract of the parties, it is thus clear that

*Formerly Act 9059, Sec. 21, Deering's General Laws.

Lawrence's duty was not to hire a specific agency to watch the tires as the opinion of the Court holds, but to see to it that the tires were watched in a careful manner. The record affirms this conclusion (R. 284-286 in 11418; R. 366-367 in 13840).

POINT TWO.

THE OPINION OF THE COURT IS IN ERROR IN THAT IT FAILS TO RECOGNIZE THAT LAWRENCE'S DUTY AS A WAREHOUSEMAN TO WATCH THE TIRES IN THE ICE PALACE WAS NONDELEGABLE AND THAT THIS PROPOSITION IS THE LAW OF THE CASE.

The opinion of the Court assumes that the Burns Agency was an independent contractor and not, as Capitol, an agent of Lawrence. There are no findings to support this assumption. On the contrary, Finding XIII assumes that the watchmen were the agents of Lawrence but finds that they were not negligent; it states (R. 125 in 13840):

> "That it is not true that said damages or any thereof, were proximately caused or contributed to by any negligence or failure of said cross-claimant or its agents, guards, or watchmen to exercise ordinary care, caution or prudence to avoid said fire, other than by the failure of said cross-claimant's agent, Capitol Chevrolet Company, so to do."

The opinion of the Court concedes that Kissel, the watchman, was negligent. Lawrence's allegations in its answer are as follows (R. 41 in 11418):

> "* * * plaintiff directed that this defendant employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant *employed and regularly maintained* on said premises day and night watchmen of the agency selected and paid for by the said plaintiff." (Emphasis added.)

It has been held in a similar situation that one who was hired by a railroad having the duties of a warehouseman to perform its duties was an agent as a matter of law and not an independent contractor.

> *Wichita Valley Ry. Co. v. Golden,* 211 S.W. 465 (Tex.Civ.App. 1919).

Assuming, however, that the Burns Agency was an independent contractor, the duty of Lawrence to watch the tires in the warehouse was nondelegable to the Burns Agency. In the Court's opinion it is stated (p. 6):

> "An exhaustive examination of California statutes and American cases generally discloses that warehousemen do not have non-delegable duties apart from their contractual obligations."

As previously pointed out herein, Lawrence did have an express contractual duty to Defense Supplies to do that which the Burns Agency did negligently. Further, even if there had been only a bailment for hire to Lawrence and no contract with Defense Supplies, Lawrence would have been under a statutory duty to preserve the subject of the bailment by providing guards. The opinion of the Court recognizes that neither contractual nor statutory duties are delegable.

It is well established in the law that a warehouseman is a bailee for hire and that the relationship between the depositor and the warehouseman is that of bailor-bailee.

L. A. Warehouse Co. v. American Etc. Co., 22 C.2d 402, 139 P.2d 641 (1943), cert. denied, 320 U.S. 790;

Atmore Truckers Ass'n v. Westchester Fire Ins. Co., 218 F.2d 461 (5th Cir. 1955);

Aircraft Sales & Service v. Bramlett, 254 Ala. 588, 49 So. 2d 144, 148 (1950).

This Court has held in an opinion by Circuit Judge Healy that delivery of goods to a warehouseman creates a bailment.

Heffron v. Bank of America Nat. Trust & Savings Ass'n, 113 F.2d 239 (9th Cir. 1940).

It is equally well established in the law that a bailee for hire cannot escape direct responsibility to its bailor by entrusting all or part of his duties as bailee to an independent contractor.

The Comet, 66 F.Supp. 231 (E.D.Pa. 1946).

> ("Here there was a bailment for hire and the rule is well settled that a bailee for hire is responsible for the proper care, not only by himself, but by any one to whom he entrusts it and it makes no difference whether that other is an independent contractor or not" [citing cases].)
>
> *Aircraft Sales & Service v. Bramlett,* 254 Ala. 588, 49 So. 2d 144, 149 (1950).

> ("The defendant [warehouseman or storage bailee] could not absolve itself of its duty in the premises

because it did not own the hanger or because the government furnished the fire-fighting equipment and made periodic fire inspections.'')

Huckins Hotel Co. v. Clampitt, 101 Okla. 190, 224 Pac. 945 (1924). (Innkeeper-bailee held to have nondelegable duty to care for guest's property.)

The cases cited in the opinion of the Court—three involving the liability of undertakers in furnishing vehicles and one involving a building wrecker—do not detract from the holdings of the foregoing cases because they do not involve bailees for hire.

The only case counsel have been able to find in which a warehouseman or bailee has been able to exculpate himself from liability for the negligence of an independent contractor is *Brunswick Grocery Co. v. Brunswick & W.R. Co.,* 106 Ga. 270, 32 S.E. 92 (1898). But in that case the warehouseman, a railroad, had not delegated its duties as a warehouseman to the independent contractor; the contractor was merely engaged in repairing a wharf owned by the railroad. If the negligent contractor in the *Brunswick* case had been engaged in caring for the plaintiff's goods, it is only reasonable to suppose that the decision in the *Brunswick* case would have been different. In any event the holding of the *Brunswick* case has been criticized as not in line with the authorities.

Annotation, 29 A.L.R. 736 at 813, *et seq.* (1924).

Finally, the District Court has already held that Lawrence's duties were *legal* and *contractual* and could not be delegated either to Capitol or to the Burns Agency. In *Defense Supplies Corp. v. Lawrence Ware-*

house Co., 67 F. Supp. 16 (N.D. Cal. 1946), Judge Goodman stated (pp. 21-22):

> "It is contended that Lawrence Warehouse Company stands acquitted of liability because the plaintiff inspected and approved the use of the premises as a warehouse, approved the agency contract with Capitol Chevrolet Company, designated the persons, including Henry, to be allowed access to the premises and selected and employed an independent detective agency to provide a 24 hour armed guard service. But by none of the foregoing acts was Lawrence Warehouse Company absolved of its legal and contractual obligation as warehouseman to protect plaintiff's property from risk of loss by fire. Nor was Lawrence Warehouse Company relieved of its duty by plaintiff's approval or selection of Capitol Chevrolet Company as agent of Lawrence Warehouse Company for the latter was under no compulsion to contract as it did with plaintiff. Having done so, it is bound thereby."

It is inconceivable that Lawrence would have been absolved of all liability to Defense Supplies if Capitol had been an independent contractor instead of an agent.

POINT THREE.

THE OPINION OF THE COURT IS IN ERROR IN HOLDING THAT DEFENSE SUPPLIES CORPORATION'S APPROVAL OR CONSENT TO THE SELECTION OF THE BURNS AGENCY RELIEVED LAWRENCE OF ITS DUTY TO WATCH THE TIRES IN THE ICE PALACE.

The opinion of the Court states (p. 7):

> "It is essential to bear in mind that Defense Supplies not only had full knowledge of the hiring of Burns to perform the desired guard service, but requested, acquiesced in, and approved of the arrangement. The exception is not applied in such circumstances. * * * Thus the facts absolve Lawrence of responsibility for negligence on the part of Burns or its agents, inasmuch as Lawrence did not delegate to Burns a duty it had itself contracted to perform."

The preceding discussion answers the assertion that the approval or acquiescence of Defense Supplies absolves Lawrence of the negligence of the Burns Agency because, as has been shown, Lawrence had a statutory and contractual duty which was broader than the mere hiring of the Burns Agency. There is no evidence that either Defense Supplies or Capitol consented or acquiesced in the negligence of the Burns Agency.

The observation in the Court's opinion is relevant, but only in a limited sense. Lawrence's liability for the acts of an independent contractor performing its duties could be based on either of two theories: First, negligence in the selection of the Burns Agency, if that were the case, or second, negligent performance by the Burns Agency of a nondelegable duty of Lawrence. Thus in speaking of the liability for the acts of independent contractors,

the *Restatement of Torts* uses the phrase, "Harm caused by negligence of a carefully selected independent contractor" (Vol. 2, p. 1127). The approval by Defense Supplies of the Burns Detective Agency precluded Defense Supplies from asserting that Lawrence had negligently selected the independent contractor. It did not preclude Defense Supplies from asserting that the Burns Agency, though carefully selected, negligently performed a nondelegable duty of Lawrence.

A further difficulty with the Court's approach to the instant case, is that in rendering the judgment in favor of Defense Supplies the District Court specifically found that the negligence of Lawrence and Capitol was in their permitting the negligent use of the acetylene torch in the Ice Palace and in failing to maintain the premises (Finding V, R. 80-81 in 11418). But the Court expressly found that Defense Supplies consented to, approved and authorized the leasing of the Ice Palace (Finding IV-A, R. 80 in 11418). These findings clearly show that it was Capitol's function of providing a storage space which was approved and acquiesced in and that it was the failure to perform the watching function that caused the fire.

The District Court has already held in this case that no amount of approval would relieve Lawrence of its duties to Defense Supplies (R. 72 in 11418). It is thus the law of this case that Lawrence could not be relieved of the statutory and contractual duties of a warehouseman by approval or acquiescence.

A realistic and determinative answer to the problem is also found if it is viewed from the standpoint of the

relationship between Capitol and Lawrence. It was the duty of Lawrence under California law and under its contract with Defense Supplies to watch the tires and it was also the statutory duty of Capitol, as custodian, to watch the tires. As between Lawrence and Capitol, Lawrence undertook to discharge the watching function and "employed the Burns Detective Agency and paid them" (R. 284-286 in 11418). Capitol knew that Lawrence placed guards at the Ice Palace (R. 193 in 11418), although there is no evidence that Capitol approved or consented to Lawrence's selection of the Burns Agency. Thus even if Lawrence undertook the watching function gratuitously, it owed the duty to Capitol to see that this function was carefully performed.

Higgins Lumber Co. v. Rosamond, 217 Miss. 1, 63 So. 2d 408, 410 (1953);

Restatement, *Agency,* Sec. 378;

Boyer, *Promissory Estoppel,* 50 Mich. L. Rev. 873, 874 (1952).

Specifically, this means that Capitol could rely on Lawrence to see to it that the tires and tubes would not be exposed to unreasonable risks by the acts of intruders. If this had not been the case, Capitol would have had to undertake the responsibility for the watching function itself in order to discharge its duties to Defense Supplies and would have had to take steps to prevent McGrew from negligently using his acetylene torch on the premises or be liable for the consequences. Its failure in the instant case to do so was occasioned only by its reliance on Lawrence's undertaking to perform the watching function. The fact that Lawrence

passed the watching function on to an independent contractor not connected with or approved by Capitol in no way lessened Capitol's reliance on Lawrence.

It is manifestly unfair to require Capitol to compensate Lawrence for the loss caused by the negligent performance of a duty which Lawrence undertook to perform.

CONCLUSION.

It cannot be doubted that the primary cause of the fire which destroyed the Ice Palace was the negligent use of an acetylene torch by McGrew and that next to McGrew the negligence of Kissel, the watchman, was the efficient cause of the fire. Furthermore, it cannot be doubted that Lawrence, as among Lawrence, Capitol and Defense Supplies, undertook the watching function. This petition has been filed to demonstrate that under the applicable statutes and case law and the law of this case, Lawrence had a statutory and contractual duty to watch the tires and that it could not absolve itself from liability for the negligent performance of this duty by delegating it to a carefully selected independent contractor. These subjects were not discussed in the briefs previously filed with this Court. It is important not only in the instant case but for establishing the liabilities and duties of warehousemen generally that this Court recognize these rules of law. The principle of the law of the case being fundamental in appellate procedure, a rehearing or a hearing *en banc* should be granted before a departure is made from this principle. The precise holding of the District Court calling for the application of this principle

was not pointed out in the briefs previously filed with this Court.

For the foregoing reasons appellants, petitioners herein, submit that this Court should grant a rehearing or, in the alternative, a hearing *en banc* of their appeals.

Dated, San Francisco, California,
November 29, 1955.

Respectfully submitted,
HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing Petition for Rehearing or for a Hearing *en banc* is well founded and that it is not interposed for delay.

HERBERT W. CLARK.

Dated, San Francisco, California,
November 29, 1955.

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellee.

APPELLANT'S OPENING BRIEF.

FINK, LEVINTHAL & KENT,
6253 Hollywood Boulevard,
Los Angeles 28, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

This appeal is from a summary judgment granted to defendant and appellee Marie DeSylva and involves an interpretation of the copyright laws of the United States, particularly Section 24 of Title 17 of United States Code. Complaint was filed under the Federal Declaratory Judgment Act, Section 2201 of Title 28, U. S. C., by Marie Ballentine, as Guardian of the Estate of Stephen William

Ballentine, a minor, seeking a declaration of the respective rights of said minor and defendant with respect to the renewal rights to certain musical copyrights owned, during his lifetime, by George G. DeSylva, deceased. [R. 1-7.] Decedent was the father of said minor and defendant was the widow of said decedent. Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1338(a). On May 11, 1953, Notice of Appeal was filed on behalf of Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, plaintiff, pursuant to the provisions of Section 1291 of 28 U. S. C. [R. 35.]

Statutes Involved.

The pertinent portion of Title 17, U. S. C., Section 24, providing for the renewal of copyrights is as follows:

> "DURATION; RENEWAL AND EXTENSION
>
> "The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name. . . . *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. . . ."

Statement of the Case.

The facts are not in dispute. The complaint alleged that Stephen William Ballentine, a minor, was the son of George G. DeSylva, deceased, who died July 11, 1950, and that defendant Marie DeSylva was the widow of decedent. Decedent, during his lifetime, owned many copyrights on musical compositions. The complaint sought a declaration of the respective rights of the minor and defendant to renewals of such copyrights effected after the death of decedent. The dispute set forth was that defendant claimed the exclusive renewal privilege to such copyrights, whereas plaintiff asserted that the minor was entitled to share equally with defendant therein. [R. 1-7.]

Both plaintiff and defendant made motions for summary judgment. [R. 14-27.] Plaintiff's motion was denied and that of defendant was granted. [R. 33.] The trial court, on a matter of first impression, based its ruling on its interpretation of Section 24 of Title 17, U. S. C., which confers the renewal rights in question. The trial court interpreted the language of that Section, which is set forth above, as giving the surviving widow or widower of an author the sole right to renewals on copyrights effected after the author's death so as to exclude the children of the author therefrom.

Questions Presented.

1. Where an author leaves surviving a widow or widower and child, does the copyright act permit both to participate in the renewals of the copyrights accruing after the death of the author, or is the widow or widower entitled to the sole rights to such renewals to the exclusion of the child?

2. If the widow and child are to share in the renewals, should the widow be ordered to account with respect to renewals obtained by her.

Specification of Errors.

1. That the Court erred in finding that an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical compositions, as well as monies received therefrom, is not necessary. [Finding VIII, R. 31.] This finding is in error because the Court should have found that the minor child was entitled to share with defendant in those renewals from which it would follow that an accounting was due from defendant to said minor.

2. That the Court erred in finding that the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest. [Finding IX, R. 31.] This was erroneous in that the Court should have found the minor child was entitled to share with defendant in those renewals and extensions.

3. That the Court erred in holding that so long as defendant, Marie DeSylva, is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest. [Conclusion of Law 1, R. 31.] This was erroneous for the reason, as above, that the minor child should be entitled to share in such renewals and extensions.

4. That the Court erred in holding that plaintiff herein has no right to an accounting from defendant for monies or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant and in further holding

that plaintiff is not entitled to an accounting of any such renewals or extensions of copyrights in the future so long as said defendant is alive. [Conclusion of Law 3, R. 32.] This is erroneous for the reason that an accounting would follow if it be held the minor child was entitled to share in such renewals or extensions.

5. That the Court erred in rendering judgment for defendant.

6. That the Court erred in failing to rule that plaintiff was at least equally entitled with defendant to the renewals and extensions of copyrights in which George G. DeSylva had an interest, which renewals and extensions were effected after his death.

7. That the Court erred in failing to rule that plaintiff was entitled to an accounting from defendant in connection with such renewals and extensions of copyrights obtained by defendant.

Summary of Argument.

The language used in the statute is sufficiently intelligible and plain to demonstrate the intention of Congress that the widow or widower should not have precedence over the children of an author with respect to renewal rights. In addition, a consideration of the objects and policy of the statute, as well as of equity and conscience, affirm such intention. Since the child of an author should be held to be equally entitled to share in the renewals of the copyrights with the defendant, defendant should be ordered to account for the renewals already obtained by her since the death of the author.

ARGUMENT.

I.

The Statute Does Not Give the Widow or Widower Precedence on the Renewal of Copyrights to the Exclusion of the Children of the Author.

A. The Intent of Congress as Reflected in the Language of the Statute Is That No Precedence as Between Widow, Widower or Child of the Author Was Intended.

> "The intention of the Congress is to be sought for primarily in the language used and where this expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture."[1]

Although it may be contended that the language of the statute is not completely free from ambiguity, the language nevertheless expresses the intention of Congress, reasonably intelligible and plain, that the widow or widower is not to have priority on renewals of copyrights to the exclusion of the children of an author. Such intention is demonstrated in the statute by unmistakably indicating the priority of each particular group or class entitled to the renewal privilege by the use of a qualifying phrase inserted between groups.

Thus, the person first entitled is the author, if still living. The next group or class of widow, widower, or children, becomes entitled "if the author be not living." Then comes the author's executors, "if such author's widow, widower, or children be not living." The next of

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[1] *Thompson v. United States,* 246 U. S. 547, 551, 38 S. Ct. 349, 351, 62 L. Ed. 876.

kin follow "in the absence of a will." In this manner the order of priority is carefully delineated.

No such qualifying phrase is found within the group or class of widow, widower, or children. If priority within the group had been intended, a similar qualifying phrase indicating priority in this instance would have been employed just as it was used to indicate priority between the groups. The statute would then have read substantially as follows:

> "That . . . the author of such work, if still living, or the widow or widower of the author, if the author be not living, or if such author, widow or widower be not living, the children of the author, or if such author, widow, widower, or children be not living, then the author's executors. . . ."[2]

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[2]"Whether the widow takes precedence over the children in renewing the copyright has not been adjudicated, although this question is constantly troubling the Copyright Bar. The sound and only proper view is that the widow and children are members of the same class, any member of which can apply for the renewal and obtain legal title to the renewal, but he will be deemed a trustee thereof for the other members of the class. If it were the intention to give the widow precedence over the children, the Act would have so stated. The section would then have read, that the widow could renew, if the author is not living, or if neither the author or widow is living, then the renewal should be by the children.

"The injustice of holding otherwise is evident in the case where an author had been married several times and was survived by children by a prior marriage.

"Could it be said that the Act intended that the wife who was the widow at the death of the author should take the entire renewal to the exclusion of the children by a prior marriage? Where the widow and several children survive, and one child files a renewal, he holds the legal title for himself as trustee for the widow and each of the other children." (*Tannenbaum*, Practical Problems in Copyright, CCH Law Handybook—7 Copyright Problems Analyzed (1952), pages 7, 12. See also 2 *Warner*, Radio and Television Rights, 246, Sec. 81; 2 *Socolow*, The Law of Radio Broadcasting, page 1218. *Cf. Silverman v. Sunrise Pictures Corp.* (2nd Cir., 1921), 273 Fed. 909, 912, cert. den. 262 U. S. 758, 43 S. Ct. 705, 67 L. Ed. 1219.)

This is rendered all the more apparent when it is noted that an earlier draft of the statute read as follows:

> "That the copyright . . . may be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children. . . ."[3]

The fact that this specific provision was proposed and dropped in favor of the present language additionally demonstrates the intention to group the children and widow or widower in a single class, and further that, although the statute provides an order of enumeration, that order of enumeration is by classes.

Although direct case authority on this point is lacking, we do find that it has been assumed (without expressly passing on the point) that the widow, widower or children took together as a class. Thus, in *Edward B. Marks Music Corporation v. Jerry Vogel Music Company, Inc.*,[4] the Court first pointed out that there was no proof that the deceased co-author left no widow or children surviving him and then went on to state:

> "Under the statute the right of renewal vested in *them* to the exclusion of the brother if *they* survived the co-author." (Emphasis supplied.)

In *Harris v. Coca-Cola Company*,[5] the Court pointed out that the original Copyright Act provided for renewals

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[3]Section 19 H. R. 19853 and S. 6330, 59th Congress, First Session, entitled "A Bill to Amend and Coordinate the Acts Respecting Copyright."

[4]47 Fed. Supp. 490, 492 (Dist. Ct. N. Y., 1942), affd. 140 F. 2d 266, 268 (2nd Cir., 1944).

[5]73 F. 2d 370, 371 (5th Cir., 1934), *cert. den.* 294 U. S. 709, 55 S. Ct. 406, 79 L. Ed. 1243.

and extensions in the author himself but later acts added the widow and children as beneficiaries if the author be dead.

In the absence of direct case authority, the construction by those charged with the duty of executing the statute is entitled to persuasive weight and ought not to be overruled without cogent reasons.[6] That agency in the instant case is the Copyright Office. The Copyright Office has taken the position that the order of enumeration specified in the statute is by classes and that the children and widow or widower are to be taken as a single class for renewal purposes;[7] further, that the widow or widower does not take precedence over the children in asserting renewal claims; and that the benefits of the renewal are

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[6]*Billings v. Truesdell* (1944), 321 U. S. 542, 552, 64 S. Ct. 737, 743, 88 L. Ed. 917; *Turnbull v. Cyr* (9th Cir., 1951), 188 F. 2d 455, 457; *Hoague-Sprague Corporation v. Frank C. Meyer Co.* (Dist. Ct. E. D. N. Y., 1929), 31 F. 2d 583, 585. See also *Bent v. C. I. R.* (9th Cir., 1932), 56 F. 2d 99, 102.

[7]The following is an excerpt from Circular No. 15 of the Copyright Office entitled "Instructions for Securing Registration of Claims to Renewal Copyright":

> "The following persons are entitled to claim a renewal copyright: 1. Aside from the groups of works mentioned in Paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons: a. The author of the work, if he is still living at the time when renewal is sought. b. If the author is not living, his widow (or widower) or children may claim renewal. c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal. d. If the author died without leaving a will, and neither his widow (or widower) nor any of his children are living, his next of kin may claim renewal."

held as tenants in common so that if one of the class renews, he does it for the benefit of all.[8]

Defendant has based her contention that the widow or widower takes precedence over the children on the argument that the language referring to the group of "widow, widower, or children" employs the coordinating particle "or" and that such word is used in the disjunctive, meaning an alternative. In this connection we note, first, that "or" used as an alternative does not denote a priority

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[8]This position is set forth by George D. Cary, Principal Legal Advisor to Copyright Office, in letters sent to counsel for both parties herein, as follows [see R. pp. 8 to 10].

> "It has always been the position of the Copyright Office, as expressed in our information circulars and correspondence, that a deceased author's widow and children are to be regarded as a single class for renewal purposes, and that the widow takes no precedence over the children in asserting renewal claims. While the instructions appearing on page 2(a) of Form R may not make this clear, the fact that the widow and the children are treated as separate, in stating the language to be used for asserting renewal claims, should not be interpreted as an implication that the one is to be preferred over the other. Our Circular 15 treats them as a single renewal category.
>
> "We express this position in daily practice by accepting the renewal claims of an author's widow, and those of his children, on the same application. It is perhaps significant, in this connection, to note that if we regard two claims as basically conflicting, we will register them, but not on the same application. Likewise, we raise no question concerning joint widow-children claims and register them without correspondence. This differs from cases where a claim is asserted contradicting one which has already been registered, since we make a practice of requesting an explanation in such instances, before proceeding with entry of the inconsistent claim.
>
> "This is not to say that we regard our position as the only possible one, or that we rule out the possibility that a court may adopt the opposite position. However, we do feel that, in the absence of any direct authority, our present position is more probably correct. Likewise, it accords with our rule

unless we modify the language employed by reading into it some qualifying phrase such as "or if no widow or widower survive, then the children. . . ."[9] To do so would, of course modify the language used in the statute by construction.

Secondly, it is well established that the conjunctive and disjunctive are signified by the use of the word "or" if to do so is consistent with the legislative intent.[10]

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of registering claims in doubtful cases since, if we adopted the opposite conclusion, we would be forced to reject outright the entry of certain claims.

"There is no direct authority on this point, although the commentators seem to be in general agreement that the widow and children are to be regarded as a single class, and are to hold the benefits of the renewal as tenants in common. Concededly, the language of the statute is not without ambiguity, although perhaps the more persuasive construction would seem to treat the claimants as one group. On the other hand, at least one aspect of the legislative history of the provision appears to support our position. The present language of the Section was substituted for that used in an earlier draft of the statute, which read: '. . . that the copyright . . . may be further renewed and extended by his widow, or in her default or if no widow survive him, by his children.' The fact that this specific provision was dropped in favor of the present language could imply an intention to group the widow and children together."

[9]Webster's New International Dictionary, Second Edition, Unabridged, defines "or" as: "a coordinating particle that marks an alternative; as you may read or may write . . . it often connects a series of words or propositions presenting a choice of either; as he may study law *or* medicine *or* he may go into trade." Disregarding our feelings of what he should study, it is clear that the word "or" by itself indicates a choice and nothing more—it does not indicate which choice is preferable until language is added or read into the sentence to indicate that.

[10]*Union Starch and Refining Company v. N. L. R. B.* (7th Cir., 1951), 186 F. 2d 1008, 1014, *cert. den.* 342 U. S. 815, 72 S. Ct. 30, 96 L. Ed. 617, and cases therein cited; *Tyson v. Burton* (1930), 110 Cal. App. 428, 294 Pac. 750, 752.

It has also been stated that the popular use of the words "or" and "and" is loose and frequently inaccurate and their sense is more readily departed from than that of other words.[11]

It would hardly seem probable that Congress would have used the word "or" to denote a priority as between the widow or widower and children in view of the fact that the exact same type of priority as to renewals is specifically spelled out as to all other persons or classes.

B. A Review of the Objects and Purposes of the Act Further Establishes That the Widow or Widower Was Not Intended to Be Preferred Over the Children.

The purpose of the section in question clearly "to protect widows and children from the supposed improvidence of authors in the colloquial sense."[12] The renewal right is "a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty."[13] It could not be disputed that the children of an author normally are dependent upon or properly expectant of the author's bounty and are part of the group of those in whom he is most concerned.

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[11] *Asher v. Stacy* (1945), 299 Ky. 476, 185 S. W. 2d 958, 959; *Murphy v. Zink* (1947), 136 N. J. L. 235, 54 A. 2d 250, 253; 2 *Sutherland,* Statutory Construction (Third Ed.), page 451.

[12] *Shapiro, Bernstein & Co. v. Bryan* (2nd Cir., 1941), 123 F. 2d 697, 700.

[13] *Silverman v. Sunrise Pictures Corp., supra; cf. White-Smith Music Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247, 251, 253, referring to the policy of the civilized world to secure the extension of a copyright to the author or his family and also that the author or those named as the persons in whom he is most concerned should not be cut off from the rights of renewal.

Some argument has been advanced that if the widow got the entire renewal right, she would take care of the children anyway. This hardly seems a legal basis for depriving the children of their rights in these copyrights. In any event, of course, the widow or widower would not be prejudiced by having the statute *insure* that the children be provided for and that their rights in these copyrights would not be taken away. By way of analogy, we note that the various intestate succession statutes almost universally provide that the children share directly with the widow or widower in the estate.

Many examples may be given of situations illustrating the need for direct protection of the children of an author. Thus:

(a) An author may die while separated from his or her spouse although not yet finally divorced; obviously, to award the spouse the entire renewal rights would thwart the desires of the author.

(b) The deceased author may leave children of a previous marriage.

(c) The widow or widower might be improvident or incompetent in the management of money or in the disposition of the copyrights, particularly in the absence of the necessity to account to a court such as would be the case if a guardian of minor children (whether or not it be a parent) were involved.

(d) A widow or widower might remarry and come under the influence of the subsequent spouse to the prejudice of the children of the author.

(e) The widow or widower might have distorted views as to his or her own needs as compared with those of the children.

(f) The widow or widower might favor the children of a subsequent marriage entered into after the death of the author to the prejudice of the author's children.

(g) The widow or widower might, for one reason or another, be on unfriendly terms with the author's children and deprive them of their rightful share in the copyrights.

It is particularly important to note that if precedence is given to the widow or widower over the children with respect to renewals, such widow or widower gets not merely a life estate in those renewals effected by him or her, but the entire right therein.[14] If a widow or widower obtains a renewal on a copyright after the author's death, the copyright for the remaining twenty-eight years belongs to the widow or widower outright whether or not he or she survives the additional twenty-eight years. If the widow or widower dies immediately after obtaining the renewal, the copyright would go to the estate of such widow or widower and not to the author's children. The obvious injustice which would thus result from holding that a widow or widower takes precedence to the exclusion of the author's children, is further evidence that Congress did not intend such results to follow but intended

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[14]See *White-Smith Music Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247, 250.

the widow, widower, and children to be treated as a class for renewal purposes.

It is therefore submitted that not only the language used but a consideration of the objects and policy of the statute, as well as of equity and conscience,[15] all point to the construction that the widow, widower and children constitute a single class for renewal purposes.

II.

The Trial Court Erred in Failing to Order an Accounting by Defendant With Respect to Renewals Obtained by Her.

If it be ruled that the widow and child are to share in the renewals, then the defendant should account to plaintiff with respect to renewals already obtained by her. Where one of a class entitled to a renewal of copyright obtains the renewal for himself, he holds the same in trust for the benefit of the entire class.[16] As such constructive trustee, defendant should account to plaintiff.[17]

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[15]*S. E. C. v. C. M. Joiner L. Corp.* (1943), 320 U. S. 344, 350, 64 S. Ct. 120, 123, 88 L. Ed. 88; *United States v. Dotterweich,* 320 U. S. 277, 280, 64 S. Ct. 134, 136, 88 L. Ed. 48, rehearing denied 320 U. S. 815, 64 S. Ct. 367, 88 L. Ed. 492; *Dinkins v. Cornish* (Dist. Ct. E. D. Ark., W. D. 1930), 41 F. 2d 766, 767, 50 Am. Jur. 283 to 297.

[16]*Tobani v. Carl Fischer, Inc.* (2nd Cir., 1938), 98 F. 2d 57, *cert. den.* 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420; *Silverman v. Sunrise Pictures Corp., supra.* See also *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.* (2nd Cir., 1944), 140 F. 2d 266, 267; *Edward B. Marks Music Corp. v. Wonnell* (Dist. Ct. S. D. N. Y., 1945), 61 Fed. Supp. 722.

[17]*Maurel v. Smith* (2nd Cir., 1921), 271 Fed. 211; *Crosney v. Edward Small Productions* (Dist. Ct. S. D. N. Y. 1942), 52 Fed. Supp. 559, 561; *Edward B. Marks Music Corp. v. Wonnell, supra.*

Conclusion.

Although the language of the renewal section of the Copyright Act could have been made more precise, nevertheless it is sufficiently plain and intelligible to spell out the intention of Congress that the widow or widower was not to be given precedence over the children of an author with respect to renewal rights accruing after the death of an author. On the contrary, the language used establishes the intention to treat them as a class entitled to participate in renewals. This intention is affirmed when the languege used is viewed in the light of the policy and purposes of this portion of the statute, which was to protect the immediate family of the author and not just his or her widow or widower. Giving preference to the widow or widower would unjustly deprive the children of their rightful share in these copyrights. The judgment of the trial court should, therefore, be reversed and it should be declared that so long as both are alive, the widow and child are equally entitled to renew copyrights originally obtained by George G. DeSylva, and that defendant should account to plaintiff with respect to those renewals already obtained by defendant since the death of George G. DeSylva.

Respectfully submitted,

FINK, LEVINTHAL & KENT,
Attorneys for Appellant.

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

CROSS-APPELLANT'S OPENING BRIEF.

PAT A. McCORMICK and
PATRICK D. HORGAN,
905 Van Nuys Building,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Cross-Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

Appeal from the United States District Court, Southern District of California, Central Division.

I.

Jurisdiction of District Court.

This is a cross-appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered April 29, 1953.

Cross-appellee, as guardian of the estate of Stephen William Ballentine, filed her complaint in the District Court for declaratory judgment and for an accounting as to alleged rights in and to renewals and extensions of copyrights. Cross-appellant filed her answer and on motion by each party for summary judgment, the court ordered judgment.

Jurisdiction of the action in the District Court was founded upon Title 28, U. S. Code, Section 1338(a), providing for original jurisdiction in the United States District Court of any civil action arising under any Act of Congress relating to copyrights. The declaratory judgment was authorized by Section 2201 of Title 28, U. S. Code, as it involved an interpretation by the court of Section 24, Title 17, U. S. Code, relating to extensions and renewals of copyrights.

II.

Jurisdiction of the United States Court of Appeals.

This Honorable Court has jurisdiction to review the judgment rendered by the District Court under the provisions of 28 U. S. C. A., Sections 1291 and 1294.

III.

Statement of the Case.

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life, and was the owner or part owner of said copyrights. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and cross-appellant herein. Other copyrights will, in the future, come up for renewal.

Marie Ballentine, as the mother and guardian of the estate of Stephen William Ballentine, cross-appellee herein, filed a complaint in the District Court herein on August 8, 1952, contending that as the son of George G. DeSylva, Stephen William Ballentine was equally entitled with Marie DeSylva, widow of George G. DeSylva, to the renewals and extensions of said copyrights and prayed for a declaratory judgment and for an accounting.

Cross-appellant, on January 7, 1953, filed her answer herein, contending that in accordance with the provisions of Section 24, Title 17, U. S. Code, relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and further contended that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of Section 24, Title 17, U. S. Code, and prayed for a declaration of the rights and duties of the respective parties and for a declaration that she is the sole owner of said renewals and extensions of copyrights.

Motions were made by both parties for summary judgment.

It was stipulated between the parties that Stephen William Ballentine is the son of George G. DeSylva, deceased, and of Marie Ballentine, and also that the said George G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine, or at any other time.

By affidavit in support of cross-appellee's motion for summary judgment, Leon Kent, attorney for cross-appellee, set out facts to the effect that George G. DeSylva

had in his will and in a complaint and an amended complaint in an action in the Superior Court of the State of California, in and for the County of Los Angeles, acknowledged Stephen William Ballentine to be his son.

In a judgment entered April 29, 1953, the District Court held that in accordance with Section 24, Title 17, U. S. Code (the section relating to persons entitled to renewals and extensions of copyrights) so long as cross-appellant, Marie DeSylva, is alive she, as the widow of George G. DeSylva, is the sole owner of all rights to renewals and extensions of all copyrights in which George G. DeSylva had an interest and that cross-appellee has no present right to an accounting nor will have any right to an accounting so long as cross-appellant, Marie DeSylva, is alive.

It is noted that the judgment of the District Court was generally in favor of cross-appellant. This cross-appeal, however, follows because in its Conclusions of Law the District Court declared that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights [Conclusion of Law 2, Tr. p. 32].

Cross-appellee within the time allowed by law appealed and cross-appellant within the time allowed by law filed her cross-appeal from that portion of the judgment only which incorporates the conclusion of law of the District Court that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

IV.

Specification of Error.

Cross-appellant hereby makes the following Specification of Error:

> That the District Court erred in its conclusion of law that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

V.

Summary of Argument.

It is cross-appellant's position herein that an illegitimate child is not a child within the meaning of Section 24, Title 17, U. S. Code, which confers upon certain specifically named persons rights to renewals and extensions of copyrights, and it is further contended that the mere acknowledgment of an illegitimate child, within the meaning of Section 255, of the Probate Code of the State of California, does not amount to legitimation of such child, and hence adds nothing to the status of the child within the meaning of the aforesaid copyright statute.

VI.

Preliminary Statement.

When this case was submitted to the District Court for decision, the court had before it a stipulation of the parties that Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and of Marie Ballentine and that the said George

G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine or at any other time [Tr. pp. 20-21]. Also, the court found as a fact that Marie Ballentine is the mother of Stephen William Ballentine and that George G. DeSylva and Marie Ballentine were not husband and wife at the times of the conception and birth of said child [Finding of Fact 3, Tr. p. 30].

The court also found that the child had been acknowledged by George G. DeSylva within the meaning of Section 255 of the Probate Code of the State of California [Tr. p. 30].

Section 255 of the Probate Code provides as follows:

> "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral."

It is noted that this statute does not purport to legitimate an illegitimate child except where the child's parents intermarried. In this case, it has been stipulated that the parents of Stephen William Ballentine were never

married at any time [Tr. p. 20]. Hence, for purposes of this argument, Stephen William Ballentine is considered an illegitimate child.

The consequences, if any, of acknowledgment upon the question as to whether an illegitimate child is included within the term "child" in the copyright law will be discussed later herein.

The court concluded as a matter of law that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights [Tr. p. 32]. The pertinent copyright law here involved in Section 24, Title 17, U. S. Code, relating to duration, renewal and extension of copyrights, a portion of which statute provides:

> "* * * And provided further, That in the case of any other copyrighted work, including a contribution by an individual author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years * * *. (July 30, 1947, c. 391, §1, 61 Stat. 652.)"

In the absence of any direct case authority, the District Court construed Section 24, Title 17, to include an illegitimate child within the meaning of the term "children" in said statute.

Cross-appellant will argue herein that both at common law and under American statutes, both state and fed-

eral, the words "child" or "children" mean only legitimate child or children; further that Section 24, Title 17, U. S. Code, requires the aforesaid historical meaning of the terms "child" and "children"; and further that the mere acknowledgment of Stephen William Ballentine by George G. DeSylva as his son does not change the ordinary meaning to be given to the words "child" or "children" under the copyright statute.

VII.

At Common Law, the Words "Child" or "Children" Meant Only a "Legitimate" Child or Children.

At common law, an illegitimate child meant *filius nullius,* the child of nobody, or *filius populi,* a child of the people. Such a child had no father known to the law and indeed not even a mother. (See 7 Am. Jur. 627.)

So deeply entrenched in the common law was this concept that in a suit brought by an illegitimate child against a railway company for damages under Lord Campbell's Act, the English predecessor of our wrongful death statute, the court held that the word "child" in Lord Campbell's Act (Sec. 2, 9 & 10 Vict. c. 93) did not include the plaintiff illegitimate child. (*Dickinson v. Northeastern Ry. Co.,* 9 Law Times Rep. 299 (1863).)

Pollock, C. B., said at page 300:

> "We are all agreed that the application for this rule must be refused. We have no doubt that in *this Act of Parliament as in all others,* the word 'child' means 'legitimate' child only; and I should be very sorry to throw the least doubt upon the point by granting the present rule." (Emphasis supplied.)

In a case involving the construction of a will, Lord Eldon used the following emphatic language:

> "The rule cannot be stated too broadly that the description 'child, son, issue,' every word of that species, must be taken *prima facie* to mean legitimate child, son or issue."
>
> *Wilkinson v. Adam,* 1 Ves. & Bea. 422, 462, 35 Eng Rep. 179.

There are numerous expressions by the United States Supreme Court to the same effect.

In *McCool v. Smith,* 66 U. S. 218, 1 Black 459 (1861), Mr. Justice Swayne said (66 U. S. 221):

> "By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate unless a different intention is clearly manifested."

VIII.

The Words "Child" or "Children" in American Statutes Generally Mean Legitimate Child or Children.

Frequently, American courts have had occasion to interpret the meaning of the words "child" or "children" in statutes where the statutes themselves do not define such words. Thus, interpreting compensation acts, the courts have generally held that the word "child" or "children" in such statutes mean only legitimate child or children.

See:

In re Dragoni, 53 Wyo. 143, 79 P. 2d 465 (1938);

Luskin v. Triangle Farms (La. App.), 24 So. 2d 213, 215 (1945);

Bell v. Terry & Tench Co., 163 N. Y. Supp. 733, 735, 177 App. Div. 123 (1917);

Balanti v. Stineman, 131 Pa. Sup. 344, 200 Atl. 236;

Gritta's Case, 236 Mass. 204, 127 N. E. 889.

Also, courts have similarly interpreted the words "child" or "children" in construing wrongful death statutes.

See:

Brinkley v. Dixie Const. Co., 205 Ga. 415, 54 S. E. 2d 267, 268;

Adams v. Powell, 67 Ga. App. 460, 21 S. E. 2d 111, 112;

Washington B. & A. R. Co. v. State, 136 Md. 103, 111 Atl. 164, 169.

In *Jung v. St. Paul Fire Dept. Relief Assn.,* 223 Minn. 402, 27 N. W. 2d 151 (1947), the court had before it the question as to whether the plaintiff, a minor child born out of wedlock, was a person included as a beneficiary of a pension under Minnesota Statute of 1935, Section 69.48, which provided in part:

> "(2) A child or children * * * (such) widow and the child or children shall be entitled to a pension * * *."

In this case, the child's father had, in writing and before a competent attesting witness, declared himself to be the father of plaintiff. The factual situation was, therefore, similar to that involved in the present case.

In addition, Minnesota Statute, Section 525.172, provided:

> "An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation."

It will be noted that this statute is very similar to Section 255 of the Probate Code of the State of California on which cross-appellee apparently relies and did rely in the cross motions for summary judgment before the District Court.

The Minnesota court held that the relief statute was in no way controlled by the statute providing for inheritance by an illegitimate child. The court said (223 Minn. pp. 406-7):

> "Obviously, the foregoing statute pertains to, and confers only, the right of inheritance. It is not *in pari materia* with §69.48 so as to provide any basis whatever for construing the two statutes with reference to each other. It is also clear that the legislature did not intend thereby to abrogate the common-law rule generally, but only with respect to the right of inheritance, and then in a limited degree. No recognized rule of construction permits this court to invade the province of the legislature by a process of destroying or distorting express statutory provisions intended to limit the application of a statute.

> Not only must this section be confined to the field of inheritance, but also to a restricted portion of that field."

The court further said at page 407:

> "We have made nothing more than 'some progress' in ameliorating the harsh rule of the common law. See, *In re Estate of Snethun,* 180 Minn. 202, 230 N. W. 483. The cautious and specific manner in which the legislature granted to illegitimates a limited right of inheritance indicates that it intended thereby to establish not a repeal of, but only an exception to, the general rule."

The question of the right of an illegitimate child to inherit from the father, even though publicly acknowledged by the father during his life, is considered at length in the case of *Pfeifer v. Wright,* 41 F. 2d 464. In that opinion, the Tenth Circuit considered the right of an illegitimate child to inherit the Oklahoma property of her deceased father by reason of his acknowledgment of the child in Kansas as his daughter. By the terms of the pertinent provisions of the Kansas law, it appears that the rights of an illegitimate child and his rights to inheritance are much the same as those under Section 255 of the California Probate Code. Even though it was quite clear that the decedent had acknowledged the child, as he had here, the child was not permitted to take any interest in the Oklahoma property, and certiorari was denied by the Supreme Court of the United States, 282 U. S. 896, 78 L. Ed. 789.

IX.

The Copyright Law Requires the Ordinary Meaning of "Legitimate" Child or Children for the Words "Child" and "Children."

It will be noted that Section 24, Title 17, U. S. Code, the interpretation of which was at issue before the District Court, and further a review of the entire copyright statutes reflect that nowhere is the word "child" or "children" defined.

There are no provisions made for illegitimate children in Section 24, Title 17, U. S. Code, and it is submitted that had Congress intended to include an illegitimate child as one of the beneficiaries of the right of renewal to a copyright, that right would have been specifically spelled out as has been done in the Veterans Pension Act, 38 U. S. C. 505, 38 U. S. C. 667.

In *Mayers, et al. v. Ewing,* 102 Fed. Supp. 201 (U. S. D. C., E. D. Pa., 1952), it was held that illegitimate children of a fully insured male wage earner who died domiciled in Pennsylvania were not considered "children" of their father for purposes of devolution of intestate personal property and hence they were not eligible for insurance benefits under the Social Security Act.

This decision was based upon the meaning of the word "children" within Sections 202(c), 209(k) and 209(m) of the Social Security Act (42 U. S. C. A. 402(d), also 42 U. S. C. A. 416(e), and 42 U. S. C. A. 416(h)(1).

Under the Social Security Act, the meaning of the word "child" was determined by the law of the state of domicile of the insured individual. The court found that

under Pennsylvania law, even though the illegitimate children were recognized by the deceased wage earner as the father and had lived with him as part of his family, they nevertheless were not entitled to benefits under the act.

In the present case, in the absence of any statutory provision in the copyright law for illegitimate children, it is submitted that the word "children" in Section 24, Title 17, U. S. Code, must be given its ordinary, historical meaning of legitimate children.

Cross-appellant has been unable to find any case in which the words "child" or "children" in the copyright statutes have been construed by the courts. In this situation, it is submitted that the foregoing argument indicates that the construction of the word "children" herein should be the one generally and customarily followed by American courts, federal and state, and based upon the common law.

The federal courts have generally construed the word "wife" in federal statutes to mean a legal wife and not to include a "putative wife."

See:

Lawson v. United States, 192 F. 2d 479 (2d Cir., 1951).

Also:

Bolin v. Marshall 76 F. 2d 668, cert. den., 296 U. S. 573 (9th Cir., 1935).

In the *Bolin* case, the common-law wife was held not to be the wife and widow of the deceased under the Longshoremen and Harbor Workers Act (33 U. S. C., Secs. 901-950).

X.

The Status of Stephen William Ballentine, Under California Law, Is That of an Illegitimate Child and Hence He Is Not Included as a Child in the Copyright Act.

In determining the status of the child, Stephen William Ballentine, the court may look to the status of the child under California law. (See: *Bolin v. Marshall, supra.*)

In the present case, it is clear that Stephen William Ballentine is an illegitimate child, since his mother and father were never married at any time, and further since there was no evidence before the District Court that the child was ever legitimated under Section 230 of the Civil Code of California, which provides as follows:

> "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

It will be noted that at no time, until after the hearings of April 10 and 14, 1953, did cross-appellee make the contention that Stephen William Ballentine is a legitimated child within the meaning of Section 230, Civil Code of California. A belated attempt to advance this contention was made in the affidavit of Leon E. Kent in opposition to Defendant's Motion for Summary Judgment, dated April 17, 1953, and filed April 20, 1953 [Tr. pp. 27-29]. Even if such affidavit were properly before the court, which cross-appellant denies, the affida-

vit shows on its face that even if the affiant could testify as he stated in his affidavit, to-wit, that the decedent publicly acknowledged plaintiff as his own child and received plaintiff into his family and otherwise treated plaintiff as if he were a legitimate child [Tr. p. 28], this would still not amount to legitimation under Section 230 of the Civil Code, since the contention has no where been made by way of affidavit or otherwise that the father of Stephen William Ballentine *with the consent of his wife* received the child into his family. This is one of the essential elements of legitimation under Section 230, Civil Code.

See:

Flood's Estate, 217 Cal. 763, 21 P. 2d 579.

As disclosed by the original affidavit in support of cross-appellee's motion for summary judgment [Tr. pp. 16-17], the theory and facts upon which cross-appellee relied in submitting the matter to the District Court for summary judgment was to the effect that the child had been acknowledged by George G. DeSylva within the meaning of Section 255 of the Probate Code of California.

It is clear that Section 255 of the Probate Code has nothing to do with legitimation and is simply a statute of succession. (See: *Flood's Estate, supra.*)

Also:

Wong v. Young, 80 Cal. App. 2d 391, 181 P. 2d 741 (1947).

In *Wong v. Wong Hing Young,* an action was brought by the mother as guardian *ad litem* for support under Section 196(a), Civil Code of the State of California. It

was alleged that the child was born out of wedlock and in the answer the father, as defendant, admitted the paternity and the only issue was as to the amount required for support and for attorney's fees. In the DeSylva case the same section was in controversy and except for names and amounts the same issue involved. In the judgment in the *Wong* case, it was provided as follows:

> "It is ordered, adjudged and decreed that the plaintiff herein is the legitimate daughter * * *."

The defendant appealed on the ground that the portion of the judgment finding that the child was the legitimate daughter was in error and the court held that he was entirely correct, using the following language (80 Cal. App. 2d 391, 394, 181 P. 2d 741, 743):

> "Plaintiff next contends that, even if there were no legitimation under section 230 of the Civil Code, there was such legitimation under section 255 of the Probate Code. For the purposes of that section all that is required is an acknowledgment in writing of the relationship signed in the presence of a competent witness. While it is undoubtedly true that the admission of paternity in a verified pleading satisfies that section, the fallacy of plaintiff's position is that section 255 of the Probate Code is not a full legitimation statute but simply a statute of succession."

In the light of the situation disclosed above, it is submitted that the status of the child under California law is clearly that of an illegimiate child and that the court should have, therefore, construed Section 24, Title 17, U. S. Code, and the word "children" therein so as to exclude Stephen William Ballentine, an illegitimate child.

Conclusion.

Since Section 24, Title 17, U. S. Code, relating to extensions and renewals of copyrights, is silent as to the meaning of the word "children" contained therein, and since the copyright statutes make no specific provision whatsoever for illegitimate children, and further since under California law the status of Stephen William Ballentine is that of an illegitimate child, it is therefore submitted that the judgment of the trial court should be reversed only in so far as it includes the conclusion of law that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

It is submitted that such conclusion was erroneous in view of the foregoing and because under state and federal decisions following the common law, the words "child" and "children" are held to mean legitimate child and children.

Respectfully submitted,

Pat A. McCormick and
Patrick D. Horgan,
Attorneys for Cross-Appellant.

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Appellee.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLEE'S BRIEF.

PAT A. MCCORMICK,
PATRICK D. HORGAN, and
FLOYD H. NORRIS,
905 Van Nuys Building,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Appellee, Marie DeSylva.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

I.

Jurisdiction of District Court.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered April 29, 1953.

Jurisdiction of the action in the District Court was founded upon Title 28, U. S. Code, Section 1338(a), providing for original jurisdiction in the United States District Court of any civil action arising under any Act of Congress relating to copyrights. The declaratory judgment was authorized by Section 2201 of Title 28, U. S. Code, as it involved an interpretation by the court of Section 24, Title 17, U. S. Code, relating to extensions and renewals of copyrights.

II.

Jurisdiction of the United States Court of Appeals.

This Honorable Court has jurisdiction to review the judgment rendered by the District Court under the provisions of 28 U. S. C. A., Sections 1291 and 1294.

III.

Statement of the Case.

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life, and was the owner or part owner of said copyrights. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and appellee herein. Other copyrights will, in the future, come up for renewal.

Marie Ballentine, as the mother and guardian of the estate of Stephen William Ballentine, appellant herein, filed a complaint in the District Court on August 8, 1952, contending that as the son of George G. DeSylva, Stephen William Ballentine was equally entitled with Marie DeSylva, widow of George G. DeSylva, to the renewals and

extensions of said copyrights and prayed for a declaratory judgment and for an accounting.

Appellee, on January 7, 1953, filed her answer herein, contending that in accordance with the provisions of Section 24, Title 17, U. S. Code, relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and further contended that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of Section 24, Title 17, U. S. Code, and prayed for a declaration of the rights and duties of the respective parties and for a declaration that she is the sole owner of said renewals and extensions of copyrights.

Motions were made by both parties for summary judgment.

It was stipulated between the parties that Stephen William Ballentine is the son of George G. DeSylva, deceased, and of Marie Ballentine, and also that the said George G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine, or at any other time.

In a judgment entered April 29, 1953, the District Court held that in accordance with Section 24, Title 17, U. S. Code, so long as appellee Marie DeSylva is alive, she as the widow of George G. DeSylva, is the sole owner of all rights to renewals and extensions of all copyrights in which George G. DeSylva had an interest and that appellant has no present right to an accounting nor will have any right to an acounting so long as Marie DeSylva is alive.

Question Presented.

On the death of the author of a copyrighted work, under Section 24, Title 17, U. S. Code, does the widow alone have the right of renewal, or do the widow and children share such right as a class?

The pertinent portion of Section 23, Title 17, U. S. Code, providing for the renewal of copyrights, reads as follows:

> "That * * *, the author of such work, if still living, or the widow, widower, *or* children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *." (Emphasis ours.)

In spite of the plain language of the statute, appellant's contention is that the word "or" does not mean "or," but means "and." It is submitted, however, that such a contention is untenable, inasmuch as the courts have, in a long line of cases, taken the position that in statutory construction the word "or" is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute. See:

In re Rice (U. S. C. A., D. C., 1947), 162 F. 2d 617, 619;

Travers v. Reinhardt, 205 U. S. 423, 430, 51 L. Ed. 865, 869;

Gay Union Co. v. Wallace, 71 App. D. C. 382, 387, 112 F. 2d 192, 197, cert. den., 310 U. S. 647;

International Mercantile Marine Co. v. Lowe (2d Cir., 1938), 93 F. 2d 663, 665;

In re 188 Randolph Building Corp. (7th Cir., 1945), 151 F. 2d 357, 358;

Adolfson v. U. S. (9th Cir., 1947), 159 F. 2d 883, 886 (cert. den., 67 S. Ct. 1307).

In the *Travers v. Reinhardt* case, Justice Harlan Stone refused to declare that the word "or" as used in a codicil to a will in much the same circumstances as the term is used here meant "and."

A simple reading of Section 24, Title 17, and all other sections of the Copyright Act dealing with the right of renewal quickly discloses that there is nothing therein which would make any portion of the act repugnant to any other portion if the normal disjunctive meaning of the word "or" is used as has been done in the numerous cases cited above.

While there have been no federal cases construing the meaning of "or" under Section 24, Title 17, U. S. Code, the meaning of the statute is clear and no reason appears why the word "or" should not be given its ordinary disjunctive meaning. It is submitted that the usual statutory interpretation of the word "or" in its disjunctive sense has been accepted by the federal courts in at least two copyright cases, by the Attorney General of the United States in an opinion rendered in 1910, shortly after the passage of the Act, and by numerous texts and other legal treatises.

Counsel for appellant assumes that inasmuch as the statute could have been written in such a manner that there would be no question as to its intent, the statute is, therefore, ambiguous or uncertain. From there they proceed to the theory that inasmuch as there are good rea-

sons why the children, as well as the widow, are the natural object of the author's bounty, Congress must necessarily have intended that the widow and children should take as a class, and that therefore the Act should read "the widow, widower *and* children" are entitled to the right of renewal.

This argument patently begs the question, "Do the words 'widow, widower or children' designate alternatives or a class?" To argue that Congress should have placed the children in the same class with the widow and that therefore the statute is ambiguous is to ignore the plain wording of the statute.

It is submitted that the assumption of ambiguity or uncertainty on the basis of what Congress should have done is no argument at all. Simply because the court is here required to construe the statute does not mean that the statute is ambiguous or uncertain. The most that can be said in this direction is that no court has had occasion to interpret the statute on this point.

Counsel for appellant apparently rely almost exclusively for their arguments upon the personal letter written by George D. Carey, of the Patent Office in answer to a query from appellant's counsel. The conclusions of Mr. Carey are unsupported by any reference whatsoever. On the other hand, appellee submits that numerous authorities take the view that the persons named in Section 24 take in the order in which they are enumerated and that necessarily the widow or widower take to the exclusion of a child or children, and in this connection, cites the following authorities:

In 18 C. J. S., page 204, the following language is used:

> "In all other cases, the right of renewal of such subsisting copyrights was in the author, if living,

or in the author's widow, widower, children, executors, or next of kin, *in the order stated,* if the author be dead." (Emphasis ours.)

Reference is made to 13 C. J., page 1090, in which the following language is used:

"* * * if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin are entitled *in the order named* to the renewal or extension of the copyright." (Emphasis ours.)

Again, on the same page, the following language is used:

"In all other cases the right of renewal of such subsisting copyrights is in the author, if living, or in the author's widow, widower, children, executors, or next of kin *in the order stated,* if the author be dead." (Emphasis ours.)

34 Am. Jur., page 423, uses the following language:

"The author of such work, if living, is entitled to the extension. If he is not living, the right exists in the author's widow, widower, or children if there is such, otherwise the extension may be secured by the author's executors, or, in the absence of a will, to his next of kin. In any case, however, an application for such renewal and extension must be made to the copyright office and duly registered therein, within one year prior to the expiration of the original term of the copyright. The purpose of the renewal provision in the copyright statute is to give to the persons enumerated *in the order of enumeration* a new right or estate not growing legally out of the original copyright property, but a new creation for

the benefit, if the author is dead, of those naturally dependent upon, or properly expectant of, the author's bounty." (Emphasis ours.)

It will be noted that all these texts specifically state that they are to take in the order named, and among the authorities cited for this statement is the case of *White-Smith Music Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247. While that case does not deal directly with the question of the right of renewal as between a widow and a child or children, the case has nevertheless been interpreted by legal students as generally holding that the widow is entitled to the right to the exclusion of the children. The opinion is a lengthy one, and while most of the language therein is interesting, it is too long to report in full. This right of renewal was held to be a new right created by Congress and by inference the person who takes on the death of the author is the widow. At page 249, the court used the following language:

> "* * * Indeed, whether the position of the complainant or the respondents be correct, the word 'proprietor' comes in legitimately because, in connection with the renewal, the persons who control the right thereto, whether widow, widower, or the author himself, may, during the year prior to the expiration of the existing term nominated in section 24, assign the right to renewal, so that the then proprietor may make the new registration required and take out the extension in his own name. * * *"

Again, at page 250, the court stated:

> "This did in truth assume to vest the new right in the widow, etc., if the author was not living, and cut out mere proprietor by omitting his name."

Shortly after the enactment of Section 24 by the Act of 1909, a lengthy opinion was handed down by Assistant Attorney General Fowler, found in Volume 28, Opinions of the Attorney General, page 162, and after quoting the provisions of Sections 23 and 24 of the Act, he uses the following language (pp. 164-5):

> "Each of these sections is specific in its terms, and leaves but little or no room for construction. In the first it is expressly provided that the assigns of an author or proprietor shall have a copyright for the work upon complying with the conditions specified in the act. In the second it is provided that if the work be posthumous or composite upon which the original copyright was secured by the proprietor, or if copyrighted by a corporate body otherwise than as assignee or licensee of the individual, or by an employer for whom such work is made for hire, the proprietor may procure the renewal, but that in all other cases it must be procured by the author, if living, or if dead, by the widow, widower, or children, or if they also be dead, by the author's executors, if there be a will, or otherwise by his next of kin; and the third section mentioned, the one here applicable, requires the extension or renewal to be procured by the author, if living, or if dead, *by the persons and in the order mentioned in the preceding section,* except as to composite works which were originally copyrighted by the proprietor, in which case the proprietor may secure the extension.
>
> "The very fact that each of these sections enumerates with such particularity the persons who may exercise the privilege of securing copyrights and having them renewed and the order in which the right vests, and that in these particulars the sections materially differ from each other, shows that the persons enumerated are exclusive of all others and that it

was not the purpose of Congress to confer the right upon any person or persons not therein specifically mentioned." (Emphasis ours.)

One of the most interesting cases dealing with the question is that of *Silverman v. Sunrise Pictures Corp.* (2nd Cir., 1921), 273 Fed. 909. In that case, Augusta E. Wilson was the author of "At the Mercy of Tiberius," and had obtained a copyright thereon which expired on October 12, 1915. She died testate in 1909, leaving no husband, children or descendants of children, and by her will devised all copyrights, etc., to her brothers, sisters and their issue. Her estate was probated and the executors discharged in 1911. Within the time allowed for renewal of copyright, two sisters filed an application for renewal as next of kin and plaintiff as the assignee of the next of kin sought an injunction against the defendants for using the book for making a motion picture. The District Court denied the injunction but Judge Hough, in writing the opinion for the United States Court, at page 911, used the following language:

"We cannot discover that what may be called the renewal provisions of the present act have received judicial consideration other than that of *White, etc., Co. v. Goff, supra,* affirming the opinion of Brown, District Judge, in (D. C.) 180 Fed. 256. These cases very closely follow the reasoning and conclusion of Assistant Attorney General Fowler (28 Op. Attys. Gen. 162) rendered shortly before the judgment of the appellate court.

"On this authority, as well as, the reason of the matter, we regard it as settled: (1) that the proprietor of an existing copyright as such as no right to a renewal. (2) There is nothing in *Page v. Banks,* 13 Wall. 608, 20 L. Ed. 709, opposed to this

ruling. (3) The statute confers no right of renewal upon administrators. (4) The purpose of the statutory renewal provisions is to give to the persons enumerated *in the order of their enumeration* a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." (Emphasis ours.)

Here, again, is the same interpretation placed upon the intent of Congress as to the right of renewal as that adopted by Corpus Juris, Corpus Juris Secundum, American Jurisprudence, and the Attorney General, and the same interpretation applied to the opinion in *White-Smith Music Publishing Co. v. Goff* as that of the others, and in the opinion of Judge Hough, it is settled that the right of renewal is in the persons enumerated in Section 24 in the order in which they are named.

To the same effect is *Fox Film Corp. v. Knowles,* 274 Fed. 731.

We have endeavored to check all available legal treatises, etc., on the subject. Many of these works are satisfied simply to quote the statute without comment. With the exception of Tannenbaum in his treatise on Practical Problems in Copyright, C. C. H. Law Handybook, 7 Copyright Problems Analyzed (1952), all who have seen fit to discuss the specific question here at issue make the statement that the right of renewal passes to the persons enumerated in Section 24 in the order in which mentioned. We think quotations from some of these works might be of interest to the court.

The following works, without our attempting to quote the exact language, make the statement that the right of

renewal of a copyright passes to the author, if living, and if the author be not living, to his widow, or the widower, the author's children, or if they be dead, to his executors or next of kin, and in the order named. See:

Law of Copyright and Literary Property, Horace G. Ball, 1944, page 201;

Copyright Law, Weil, 1917, page 365;

How to Secure Copyright, Richard Wincor, 1950, pages 10 and 45;

The Copyright Law, Howell (formerly Assistant Register of Copyrights), 1952, 3rd Edition, page 109.

In three works on Copyright, the authors go into this specific question in detail.

In *A Manual of Copyright Practice,* by Margaret Nicholson (1945), at pages 195-6, in discussing this subject, or questions relating thereto, the following questions are asked and answers given:

"The publisher is assigned copyright of an author. Author dies and copyright is about to expire. Publisher wishes to renew copyright. The understanding is that he can't. Copyright must be renewed by author's heirs. Am I correct?

"No. The publisher may renew the copyright in the name of the widow or widower, if there is one; of the child or children, if there is no widow or widower; of the next of kin, if the author died intestate; of the executor, if the author is recently dead and the estate is not settled. He cannot renew it in his own name, and his renewal of it in the name of any of the persons listed above gives him no power over it without direct permission from that person. But it saves the copyright."

Page 197:

"The law says if an author is dead, the renewal must be obtained by his wife, or his heirs, or the executor named in his will. If the wife also dies, should the renewal be obtained by her executor or the executor in the author's will (presuming there are different executors, of course)?

"The Copyright Act stipulates that if an author is dead the renewal may be made by

I. His widow. If there is no widow, by
II. His child. If there are no children, by
III. The author's executor. If he died intestate, by
IV. The author's next of kin."

In another work, *An Outline of Copyright Law* by DeWolf (1925), at pages 65-6, we find the following language:

"The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, *i. e.,* the person having the first right is the author, if living, at the end of the original term; if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to renewal.

"If there are several children who are entitled to take the renewal copyright, it seems they take it as tenants in common, * * *."

In still another text *Risks and Rights in Publishing, Television, Radio, Etc.* by Samuel Spring (1952), the

author in discussing the right of renewal of copyright, at page 94, used the following language:

> "* * * (Section 24 C. S.) The succession of these successive classes of holders to the exclusive right to renew is rigidly enforced. Each holder succeeds to his right of renewal in strict order of priority. Thus an author's children cannot renew the term if the author's 'widow be living'; his executor cannot renew if his children (the widow being dead) are living. * * *"

With respect to appellant's contention that the copyright office accepts renewal registrations from the widow and the children regardless of whether the widow is alive or not, it is elementary that the copyright office will accept registrations from any person listed in the statute without purporting to pass thereby on the validity of such registration or the rights flowing therefrom. As the Attorney General stated in his opinion published in 28 Official Opinions of Attorney General of United States (1912), pages 162, at 166:

> "When the application for renewal is presented to the Register of Copyrights, the only thing left for his consideration is whether the applicant is one of the persons designated in the statute; but who can possess the legal or equitable right after renewal is another question. * * *."

See also *De Wolf's An Outline of Copyright Law* (1925), page 68, where the author says:

> "So far as the copyright is concerned, the renewal will be registered in the name of any beneficiary named in the law. In the event of conflicting applications, no doubt registrations would be made, leaving the parties to settle their rights in court."

From the foregoing citations, it is quite clear that the courts, the Attorney General, and all legal writers on the subject, with the exception of Mr. Tannenbaum, *supra,* are of the opinion that Congress intended, by Section 24, Title 17, U. S. Code, that the widow, if living, should take to the exclusion of a child or children.

In opposition thereto, appellant is compelled to rely upon the letter from Mr. Carey, of the Patent Office, and Mr. Tannenbaum for their proposition that Congress intended that the widow and children take as a class. Mr. Carey makes the statement that the fact that an earlier draft of the bill which specifically provided that the widow should take if she survived was dropped in favor of the present reading, indicates that it could have been the intention of Congress to group the widow and children together.

In answer to this contention, it would appear more logical to assume that Congress intended that the widow take to the exclusion of the children, and that the act was worded in its present form because undoubtedly the problem was considered. It must be assumed that Congress was familiar with the fact that the word "or" had been construed by the courts in its normal disjunctive sense unless repugnant to other provisions of the statute. Knowing that Congress did consider this question by reason of the change, is it reasonable to assume that Congress, with its knowledge of the ordinary meaning of the word "or" would have used that word instead of the word "and"? It would also seem probable that had Congress intended that the widow and children take as a class, the Congressional notes would have indicated that the act was rewritten for that purpose.

Appellant's brief is prefaced upon the assumption that since the child or children, as well as the widow or widower, would be the natural objects of an author's bounty, in all cases Congress must have intended that a child or the children should share with the widow or widower, and that they share as a class. In so doing, counsel for appellant overlooks the fact that in many instances Congress has specifically provided that the widow should take in preference to the children, and that the children take, and then share and share alike, if the widow is dead. In this connection, see:

Payments to Veterans' Dependents, Section 661, Title 38, U. S. Code;

Homestead rights, Sections 164 and 171, Title 43, U. S. Code.

That Congress intended that the word "or" should be used in its normal disjunctive meaning becomes more apparent when we consider the problems that would arise if we assume that the widow and children take as a class; for example: If only one child and the widow survive, it would be natural to assume that they take, share and share alike; however, if two children and the widow survive, the problem arises, did Congress intend that the widow take one-third or one-half? And the problem becomes difficult indeed if a widow and ten children survive.

Inasmuch as the trial court, and in our opinion, properly, ruled the widow alone is entitled to the right of renewal, we submit that it is academic that the court must necessarily have concluded that the appellant was not entitled to an accounting. Under the circumstances, it is submitted that appellant's second allegation of error must necessarily fall and is not a proper issue in this appeal.

Conclusion.

In summary, it is submitted that any construction of Section 24, Title 17, U. S. Code, interpreting the word "or" to mean "and" tortures the plain meaning of the word and is in conflict with all of the decisions of the courts and with the intent of Congress. Accordingly, the judgment of the trial court finding that the appellee, as the widow, is the sole owner of any copyright renewals during her lifetime, should be affirmed.

Respectfully submitted,

PAT A. MCCORMICK,
PATRICK D. HORGAN,
FLOYD H. NORRIS,
Attorneys for Appellee, Marie DeSylva.

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Cross-Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Cross-Appellee.

BRIEF FOR CROSS-APPELLEE.

MAX FINK,
CYRUS LEVINTHAL,
LEON E. KENT,
6253 Hollywood Boulevard,
Los Angeles 28, California,
Attorneys for Appellant and Cross-appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

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BRIEF FOR CROSS-APPELLEE.

Jurisdiction of the District Court.

This is a Cross-appeal from a Summary Judgment of the District Court of the United States, for the Southern District of California, Central Division, entered April 29, 1953, and involves an interpretation of the Copyright Laws of the United States, particularly Section 24 of Title 17 of the United States Code. The action was brought under the Federal Declaratory Judgment Act, Section

2201 of Title 28, U. S. C., by Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, a minor, seeking a declaration of the respective rights of said minor and defendant (cross-appellant) with respect to the renewal rights of certain musical copyrights owned, during his lifetime, by George G. DeSylva, deceased [R. 1-7]. Cross-appellant is the widow of said decedent, and cross-appellee is his son. In the Trial Court each party made a motion for summary judgment based upon certain undisputed facts, and the Court made findings of fact based upon these undisputed facts and rendered judgment. Jurisdiction was conferred on the District Court by Title 28, U. S. C., Section 1338(a), providing for original jurisdiction in the United States District Court of any civil action arising under any act of Congress relating to copyrights.

Jurisdiction of the United States Court of Appeal.

This Honorable Court has jurisdiction to review the judgment rendered by the District Court under the provisions of Title 28, U. S. C., Sections 1291 and 1294.

Statement of the Case.

We are here concerned only with matters relating to the Cross-appeal. The facts are substantially set forth in Appellant's Opening Brief, and Cross-appellant's Opening Brief.

The Trial Court made findings of fact based upon the undisputed facts. The Trial Court did not (and under the circumstances and law relating to summary judgment, could not) attempt to determine any disputed fact; and the Trial Court in effect held that the undisputed facts were

sufficient upon which to predicate judgment. Cross-appellant does not take issue with any of the findings of fact made by the Trial Court.

The particular undisputed facts relating to the problem in this Cross-appeal are as follows:

1. That cross-appellee is the son of George G. DeSylva, deceased, who is survived by the said son (his only child) and by his widow, the cross-appellant herein.

2. That one Marie Ballentine is the mother of cross-appellee. That said Marie Ballentine and said decedent were never married.

3. That cross-appellee was treated in all respects as a child of decedent, taken into decedent's home, and decedent at all times maintained a father and son relationship with cross-appellee.

4. That decedent, by his sworn statements, affidavits, and in his will and codicils thereto, and in other respects, publicly and in the presence of witnesses and in writing acknowledged and reiterated that cross-appellee was his child.

The Trial Court found and determined that decedent during his lifetime acknowledged in writing that cross-appellee was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California [Findings of Fact IV, Tr. 30].

5. The additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California, being in dispute, were not

determined by the Trial Court, the said Court holding in effect that such determination was not necessary in view of the Court's decision that the undisputed facts were sufficient to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyrights.

Question Presented.

IS CROSS-APPELLEE THE "CHILD" OF THE ORIGINAL COPYRIGHT HOLDER WITHIN THE MEANING OF THE COPYRIGHT LAWS PERTAINING TO THE RENEWAL OF COPYRIGHTS?

Summary of Argument.

It is cross-appellee's position herein that (1) an acknowledged illegitimate child is a child within the meaning of the statutes of the United States relating to copyrights, and that the acknowledgment of an illegitimate child within the meaning of Section 255 of the Probate Code of the State of California clearly brings said child within the meaning of "child" as used in statutes of the United States relating to copyrights, and particularly Section 24, Title 17, U. S. C., which confers in the alternative upon certain designated classes of persons, the right to renewals and extensions of copyrights; and (2) it is further contended by cross-appellee that said Section 24, Title 17, U. S. C., gives certain renewal and extension rights to the *children of the author* without distinction between legitimate or illegitimate children; that cross-appellant has admitted that said minor, Stephen William Ballentine, is the son of George D. DeSylva, deceased, and that *said admission alone* is sufficient to constitute said minor a child of said deceased within the

meaning of the statutes of the United States relating to copyrights; and (3) that the undisputed facts were sufficient upon which to predicate the determination that said minor is a child of the deceased within the meaning of the statutes of the United States relating to copyrights; and (4) that in the event this Honorable Court finds that a determination of the additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California, was and is necessary to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyright, then the cross-appellee is entitled to a trial on said additional facts and the case should be sent back to the Trial Court for said purpose.

Preliminary Statement.

When this case was submitted to the District Court for decision, the Court had before it a stipulation of the parties that Stephen William Ballentine is the son of George G. DeSylva and of Marie Ballentine [Tr. p. 20].

It is respectfully submitted that Section 24, Title 17, U. S. C., is not a statute of inheritance, but creates a new right; that the right to the renewal of copyrights does not grow legally out of the original copyrights, but is a new creation for the benefit (if the author be dead) of those naturally dependent upon, or properly expectant of the author's bounty.

Cross-appellee contends that neither under common law nor under American statutes, either state or federal, do the words "child" or "children" mean only legitimate child or children in so far as the statutes of the United

States relating to copyrights are concerned; that the limitations at common law with respect to the words "child" or "children" apply only to the cases of inheritance and succession, neither of which is involved herein; further, that the aforementioned statutes of the State of California, wherein said decedent resided for many years prior to and at the time of his death, have mitigated the rigors of the common law with respect to the words "child" and "children" and conferred rights on them which the ancient common law denied; and further, that Section 24, Title 17, U. S. C., does not require the restriction of the words "child" or "children" to mean only legitimate child or children, and that the aforementioned acknowledgment of Stephen William Ballentine by George G. DeSylva as a son, clearly makes cross-appellee a child of said deceased within the meaning of the statutes of the United States related to copyrights.

The Trial Court, in its Memorandum re Motions for Summary Judgment (Appx., *infra*), stated that it has been the Court's intention to find the child Stephen William Ballentine to be a child of the decedent within the meaning of the Copyright Statutes. It clearly appears therefrom that there was no doubt in the Trial Court's mind that the undisputed facts were sufficient upon which to predicate its judgment to the effect that cross-appellee is a child of the deceased, within the meaning of the statutes of the United States relating to copyrights.

ARGUMENT.

I.

Cross-appellee Is a "Child" of the Original Copyright Holder Within the Meaning of the Copyright Laws Pertaining to the Renewal of Copyrights.

A. The Harsh Early Common Law Rule Contended for by the Cross-appellant as to the Meaning of "Child" or "Children," Does Not Apply to the Statutes of the United States Relating to Copyright.

The cross-appellant has taken the narrow and arbitrary position that no one except a child born of a lawful marriage could be considered a child within the meaning of the statutes of the United States relating to copyright. Under cross-appellant's aforesaid contention, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, regardless of any close relationship existing between said father and children and the love and affection shown for one to the other, would still not be considered a child of said father for any purpose or purposes whatsoever.

Furthermore, cross-appellant would give an *unchangeable meaning* to the words "child" or "children" regardless of the passage of time or any change in circumstances. A word may vary greatly according to the circumstances and the time in which it is used,[1] and the same phrase

---

[1]Mr. Justice Holmes in *Towne v. Eisner* said:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (*Towne v. Eisner,* 245 U. S. 418, 33 S. Ct. 158, 159, 62 L. Ed. 372.)

may have different meanings in different connections,[2] and the same words may have different meanings in different parts of the same act,[3] and words of a statute to which meaning is to be given are not phrases of an Act with a changeless connotation,[4] and the meaning of words are continually shifting with the times.[5]

Cross-appellee respectfully contends that as heretofore set forth, *the within action does not involve a statute of inheritance.* Here, we are dealing with a new right *granted directly to the persons enumerated.* Hence, the common law limitation with regard to the meaning of the words "child" or "children" claimed by the cross-appellant, is in no way involved in the within action.

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[2]"But it needs no authority to show that the same phrase may have different meanings in different connections." (*American Security & Trust Co. v. Comrs. of The D. of C.,* 224 U. S. 491, 32 S. Ct. 553, 554, 56 L. Ed. 856.)

[3]"The same words may have different meanings in different parts of the same act, and of course words may be used in a statute in a different sense from that in which they are used in the Constitution." (*Lamar v. United States,* 240 U. S. 60, 36 S. Ct. 255, 257, 60 L. Ed. 526.)

[4]And Mr. Justice Cardozo in *First Nat. Bank & Trust Co. v. Beach* said:

"We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting." (*First Nat. Bank & Trust Co. v. Beach,* 301 U. S. 435, 57 S. Ct. 801, 804, 81 L. Ed. 1206.)

[5]And in *Massachusetts Protective Ass'n, Inc. v. Bayersdorfer,* it was held that:

"Words, after all, are but labels, whose content and meaning are continually shifting with the times." (*Massachusetts Protective Ass'n, Inc. v. Bayersdorfer,* 105 F. 2d 595, 597.)

B. The Harsh Early Common Law Rule With Regard to the Meaning of "Child" or "Children" Has Been Considerably Relaxed and Under the Present Concept Includes Children Born Outside of a Lawful Marriage.

The cross-appellant, on page 8 of her Opening Brief, quotes from 7 Am. Jur. 627 with regard to the meaning of an illegitimate child at common law. Immediately following said reference, we find the following:

> "Most, if not all, of the States have enacted statutes mitigating more or less the rigors of the Common Law and conferring rights which that law denied, *and the general tendency seems to be one of increasing liberality.* 7 Am. Jur. 628." (Emphasis ours.)

California is amongst said states, as evidenced by Section 255 of the Probate Code of the State of California and Section 230 of the Civil Code of the State of California.

On page 721 of 7 *Am. Jur.,* it is stated that:

> "The severity of the Common-Law rule regarding the right of illegitimates to *inherit* has led to the passage of statutes in many jurisdictions modifying it, or abrogating it completely. These statutes rest upon the principles that the relationship of parent and child ought to produce the ordinary consequence of consanguinity and that it is unjust to punish the offspring for the offense of the parents. Since they are remedial, they are as a rule liberally construed, although there is some authority favoring a strict construction." (Emphasis ours.)

And at page 722 of 7 *Am. Jur.*, we find the following:

> "* * * At the same time it is generally recognized that the words 'children' and 'issue,' as used

in the statute of descent, are not necessarily confined to children and issue born in lawful wedlock, *but include also such children and issue as are by law capable of inheriting.*" (Emphasis ours.)

In the case of *Green, et al. v. Burch, et al.,* 164 Kans. 348, 189 P. 2d 892, it was held that illegitimate children being considered in the same category as legitimate children under the state's general public policy, the use of the term "children" alone in statute does not necessarily imply that illegitimate children cannot be considered in the same classification.

The Court, in said case, stated at page 895:

"The appellee places particular reliance upon the construction which was given by this court to the so-called 'soldiers' compensation act' in the case of Miller v. Miller, 116 Kan. 726, 229 P. 361, 362, 35 A. L. R. 787. In the last-cited case it was held that a son, who was the child of a bigamous marriage and therefore illegitimate, was within the statutory provisions granting soldiers' compensation benefits to minor children of veterans. In such case it was urged that in the absence of a specific provision to the effect that illegitimate children should share in the bounty of the state, the legislature necessarily intended that only children born in lawful wedlock should receive the compensation earned by the service of the veteran. In the Miller case, *supra,* this court clearly was passing upon the meaning which should be given to the term 'children' in Kansas. The involved statute provided that compensation should be paid for the use and benefit of the widow and minor 'children,' if any, and did not define the term 'children.' The opinion in the Miller case, *supra,* written by Mr. Chief Justice Johnston, reads:

"'* * * Who are the minor children to whom reference is made? Manifestly, they are those for whose life the veteran is responsible and to whom he owes the obligation of maintenance. The statute makes no discrimination between legitimate and illegitimate minor children. It is an independent provision creating a new obligation of the veteran, recognizing his responsibility to support his minor children and applying the compensation awarded to that purpose. The theory on which compensation is payable to wife or minor children is his obligation and duty to support them. However, if there had been no statute creating a specific obligation, the father would still be liable for the maintenance of his illegitimate child as well as one born in lawful wedlock. In Doughty v. Engler, 112 Kan. 583, 211 P. 619, 30 A. L. R. 1065, the court, after discussing the early common-law rule that parents were under no obligation to support illegitimate children, determined that this rule was repugnant to present day conceptions of social obligations, and so unadapted to our conditions, and so unsuitable to the needs of the people, that it cannot be regarded as a part of the law of this state. * * *'"

And said Court further stated, at page 896:

"Unquestionably, the case of Miller v. Miller, *supra,* and the cases therein cited, are strong authority to the effect that under the general public policy of this state, illegitimate children should be considered in the same category as legitimate children. As a consequence, it cannot be correctly urged in Kansas that the use of the term 'children' alone necessarily implies that illegitimate children cannot be considered in the same classification. And it should be borne in mind that the case of Miller v. Miller, *supra,* was decided by this court in October, 1924. * * *"

It was held in *Marshall v. Wabash R. Co.,* 120 Mo. 275, 25 S. W. 179, that the term "child" in a statute authorizing a suit for wrongful death by its parent cannot be limited to mean legitimate child only. Here a recovery was allowed to a mother suing for the wrongful death of her illegitimate child. The court based its opinion upon the law of the State of Missouri which enables an illegitimate child to inherit from its mother in contravention to the harsh old common law rule that an illegitimate child has no inheritable blood.

In *Galveston H. & S. A. Ry. Co. v. Walker,* 48 Tex. Civ. App. 52, 106 S. W. 705, an illegitimate child, suing through his next friend for the wrongful death of his mother, was allowed a recovery under the Texas wrongful-death statute, and this case again based its reasoning on Texas' modification of the old common law rule that an illegitimate child has no inheritable blood.

The old common-law policy with respect to the incapacity of illegitimates was confined principally to the right to become an heir and to hold church office, and in all other respects there was no distinction between an illegitimate child and another man.[6] This common-law policy was founded on the necessity * * * "that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied on as determining the heir."[7]

According to the aforesaid outstanding authorities as to what the common-law embodied, the lack of any right

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[6]See *Blackstone* (1 Bl. Comm. New Ed., 1825), 492; please see also *Kent, Commentaries on American Law* (11 Ed., 1867), Vol. 2, p. 230.

[7]*Ayer, Legitimacy and Marriage* (1902); 16 *Harv. L. Rev.* 22, 23.

of inheritance was apparently the fundamental and original disability inflicted upon the illegitimate child. It is respectfully urged that when the right of inheritance was bestowed upon a child by statute, such as the aforementioned Section 255 of the Probate Code of the State of California, the basic disability is removed, and that it should logically be reasoned that the incidental disabilities must fall of their own weight.

C. Under the Laws of the State of California, the Word "Child" or "Children" Includes All Children, Legitimate or Illegitimate, Upon Whom Has Been Conferred by Law the Capacity of Inheritance.

In *Wolfe v. Gall,* 32 Cal. App. 286, 163 Pac. 346, 350, the Court stated as follows:

> "That the words 'children' and 'lawful issue' when found in statutes of succession are not to be confined to their strict common-law signification was decided by our Supreme Court in the Estate of Wardell, 57 Cal. 484, 491, where it is said:
>
> " 'If courts were now to restrict the word to its common-law meaning, all children born of an unlawful marriage, *all children by* adoption or *acknowledgment of their father,* and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute, the offspring of marriages null in law (section 84, Civ. Code), children born out of wedlock whose parents subsequently intermarried (section 215, *Id.*), and children by acknowledgment or adoption of their father (sections 224, 227, 228, and 230, *Id.*), *are all legitimate. These,* although incapacitated at common law from succeeding to any rights of their father, *are regarded for all purposes*

> *as legitimate from the time of their birth.* * * * Hence the term 'children,' as used in section 1307 of the law of succession, must relate to *status,* not to origin—to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they may have been begotten. *The word has, therefore, a statutory and not a common law meaning; and its meaning includes all children upon whom has been conferred by law the capacity of inheritance.'"* (Emphasis ours.)

Section 255 of the Probate Code of the State of California, provides in part as follows:

> "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock * * *."

In the Statement of Undisputed Facts accompanying plaintiff's Motion for Summary Judgment [Tr. pp. 21-24], it is clearly demonstrated that the decedent, George G. DeSylva, many times acknowledged in writing before witnesses that plaintiff was his son. It is thus clear that the plaintiff would have inherited from his father if his father had died intestate.

Looking further to the authorities in California, we find set forth in the *Estate of Lund,* 26 Cal. 2d 472, 159 P. 2d 643, a statement of policy in connection with illegitimate children which is applicable to the instant case. In that case, after first noting the early common law antagonism to both adoptions and legitimation of children

and then tracing the development of the attitude of the law toward illegitimates, the Court went on to state, at 26 Cal. 2d 480:

> "* * * The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be visited justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him, will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice * * * *It cannot be seriously disputed that the public policy of California disavows the common-law tenets and favors legitimation* * * *" (Emphasis ours.)

See also *Turner v. Metropolitan Life Insurance Co.*, 56 Cal. App. 2d 862, 133 P. 2d 859, involving the question of whether an illegitimate child took as a beneficiary under an insurance contract *payable to the children of the insured*. The Court there pointed out that the ordinary and popular sense in which the word "child" is understood, is as defined in the dictionaries, to wit, a son or daughter; a male or female in the first degree; the immediate progeny of human parents. The Court went on to state that by statutory enactments in this state, illegitimate children have been placed on a full parity as legitimate insofar as support and maintenance are concerned. The Court said at page 861 of 133 P. 2d:

> "* * * It is a matter of common knowledge that in most cases the real purpose of life insurance is to provide for the maintenance of the insured's

dependents; and as will be seen, if the insured father herein had lived he would have been legally bound by civil and criminal laws to maintain his child, notwithstanding it was his illegitimate child. It would seem, therefore, that in the absence of any restrictive language to the contrary in the policy herein *it was not unreasonable for the trial court to construe the word 'children'* as used in the policy *as meaning all children* of the insured that he was legally bound to maintain * * *." (Emphasis ours.)

And again at page 862:

"Even at common law it was held in some instances that the maxim that an illegitimate is *nullius filius* applied only in cases of inheritance (7 Cor. Jur., p. 958, note 42a; Garland v. Harrison, 8 Leigh, Va., 368; Hains v. Jeffell, 1 Ld. Raym. 68, 91 Eng. Reprint 942; Rex v. Hodnett, 1 T. R. 96, 99 Eng. Reprint 993); * * *."

The following excerpts from the Memorandum Opinion by that learned probate jurist, Judge Newcomb Condee, in *Estate of Sweed,* No. 305109, Los Angeles County Superior Court (Memorandum Opinion published in Los Angeles Daily Journal Reports, Vol. 3—No. 10—Oct. 1952), are pertinent to the question involved in this cross-appeal. In said action the Court, after quoting from Section 255 of the Probate Code, for the purpose of determining the meaning of the words "lineal issue" in connection with certain claimed inheritance tax exemption, stated:

"It is the contention of the controller that the term, 'lineal issue' does not extend to illegitimates

legitimized by their father, as it probably does not include adopted children.

* * * * * * * * *

"Webster's Dictionary defines 'issue' as 'progeny, offspring;' it defines 'descendant' as 'one who descends, as offspring.' As to the definition of the words 'child' and 'children' the following observations from Turner v. Metropolitan Life Insurance Co., 56 Cal. App. 2d 862, at page 865, seem to be controlling in the instant situation:

" 'and clearly the ordinary and popular sense in which the word child (the singular of children) is understood is as defined in the dictionaries, to wit: a son or daughter; a male or female in the first degree; the immediate progeny of human parents (Webster's Dictionary): the offspring, male or female of human parents (Standard and Oxford Dictionaries). *No distinction is drawn between legitimate and illegitimate offspring.* It is quite true that in the *law* dictionaries the technical legal definition of "child" is restricted to conform to the common law definition, that is to legitimate children.'

"The case then went on to hold that technical definitions in the *law* dictionaries did not control insurance contracts. *It should not be presumed that our legislature meant to use the technical sense of the term based purely on the common law status of illegitimates as nullius fillius, when it employed the synonymous term 'lineal issue'* in subdivision (a) of Section 13307, Revenue and Taxation Code, rather than the common meaning. Especially is this so in view of the fact that *this same legislature has broken away from the common law concepts of bastardy and given illegitimates a new and different status, thereby eliminating any reasonable basis for adhering to the common law definition.*

"The word 'children' was also defined and construed in Estate of Wardell, 57 Cal. 484. In considering the use of the term in former Section 1307 of the Civil Code (the predecessor of our present Section 90 of the Probate Code), the court expressly repudiated the contention raised that the word included only legitimate children. It held the term must relate to *status,* not to origin and that *it has a statutory and not a common law meaning, including all children, legitimate or illegitimate, upon whom has been conferred by law the right of inheritance.* See also Wolf v. Gall, 32 Cal. App. 286, at page 295, quoting from the Wardell case and observing that the words 'children' and 'lawful issue' when found in statutes of succession are not to be confined to their strict common law signification.

"The policy of the California law is clearly set forth in Estate of Lund, *supra,* at page 480. At page 479, it is noted that the common law was antagonistic to both adoptions and legitimation of children. The attitude of the law toward illegitimates was then traced from the earliest times to the present, both as developed by the common law and the civil law. It is then stated at page 480, 'The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be vested justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice . . . *It cannot be seriously disputed that the public*

> *policy of California disavows the common-law tenets and favors legitimation.'* And again, at page 485, the court states: 'We deem it uncontestable that each state may formulate its own public policy in respect to legitimation and can enact laws to carry out its policy.' While speaking of full legitimation in this case, the liberal policy enunciated bears with equal effect upon the *partial legitimation* afforded by Section 255, Probate Code, which gives the illegitimate the right to inherit under such circumstances as are present in the instant case, as if he had been born in lawful wedlock." (Emphasis ours.)

As pointed out by Judge Condee in said Opinion, although the *Lund* case speaks of full legitimation, the liberal policy enunciated bears with equal effect upon the partial legitimation afforded by Section 255 of the Probate Code of the State of California.

The cases cited by Judge Condee in his aforesaid opinion clearly indicate the public policy of California to disavow the common-law tenets and to favor legitimation, and that the California legislature has broken away from the common-law concepts and given illegitimates a new and different *status,* such as the legitimation afforded by Section 255 of the Probate Code, thereby eliminating any reasonable basis for adhering to the common-law definition. The aforesaid quoted portions, in speaking of the word "children," indicate that the said term must relate to *status,* not to origin, and that today the term "child" includes all children, legitimate or illegitimate, upon whom has been conferred by law the right of inheritance.

D. The Purposes and Intent of the Copyright Law Requires the Inclusion of the Cross-appellee Within the Purview of the Phrase "Children of the Author" Used Therein, and the Cross-appellee Is a Child of George G. DeSylva, Deceased, Within the Meaning of the Statutes of the United States Relating to Copyrights.

It is respectfully urged to the Court that Title 17, U. S. C., Section 24, merely uses the words "children of the author" without defining the word "children." By the same token, said section makes no discrimination between legitimate or illegitimate children. It was stipulated between the parties that Stephen William Ballentine is the son of George DeSylva, deceased [Tr. p. 20]. *The foregoing alone should suffice to constitute the aforesaid minor a child* within the meaning of the statutes of the United States relating to copyrights, as concluded by the District Court. Here, however, we have the additional facts and finding that said minor was acknowledged in writing and before witnesses to be the child of George G. DeSylva within the meaning of Section 255 of the Probate Code of the State of California.

Section 24 of Title 17, U. S. Code is not a statute of inheritance but creates a new right. The right to the renewal does not grow legally out of the original copyright but is a "new creation for the benefit (if the author be dead) of those naturally dependent upon, or properly expectant of, the author's bounty."

> *Silverman v. Sunrise Pictures Corp.* (2d Cir., 1921), 273 Fed. 909, 911.
>
> See also *Shapiro, Bernstein & Co. v. Bryan,* 123 F. 2d 697, 700.

The purpose of the aforesaid section is to provide as a matter of public policy that the right of renewal should be personal and that the author, or those named as the persons in whom he is most concerned, should not in any way be cut off from the benefit of the new monopoly.

White-Smith Pub. Co. v. Goff (1st Cir., 1911), 187 Fed. 247, 253.

Exhaustive research has indicated that there is no case defining the word "children" as used in Section 24 of the Copyright Act. Perhaps the closest case in point is the leading case of *Middleton v. Luckenbach S. S. Co.* (2d Cir., 1934), 70 F. 2d 326. That case involved the deaths of several persons on the high seas. Recovery was sought under the Federal Death Act, which provided for a suit to recover damages for the benefit of "decedent's wife, husband, parent, child or dependent relative * * *." The questions presented in that case were whether under such statute an illegitimate child could recover for the death of its mother and also whether the mother of such a child is entitled to recover damages for its death. *The Court answered both questions in the affirmative.* The opinion pointed out that in its ordinary meaning the word "child" would include an illegitimate child; that although under some constructions as found in *legal* dictionaries the word "child" means a legitimate child, such construction originated in the consideration of wills, deeds, and statutes of inheritance, which differ from the questions here under consideration. In language particularly appropriate to our case, the Court went on to state at pages 329 and 330 as follows:

"There is no right of inheritance involved here. It is a statute that confers recovery upon dependents,

not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. *Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view.* The purpose and object of the statute is to continue the support of dependents after a casualty. *To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act.* The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. *The rule that a bastard is nullius filius applies only in cases of inheritance.* Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood. 2 Kent's Commentaries (12th Ed.) 215." (Emphasis ours.)

It was held in *Compagnie Generale Transatlantique v. United States* (1948), 78 Fed. Supp. 797, that an acknowledged illegitimate child is a child within the statute bestowing citizenship upon a foreign-born child. The Court in said case pointed out that the purpose of the statute bestowing citizenship on a foreign-born child of an American citizen was to insure that the child had in it the blood of an American citizen and that that fact would be evident without the uncertainties of a contested trial of paternity. The statute therein involved speaks of "any child" whose father is a citizen of the United States. Said statute did not define the words "any child." The question there involved was whether said statute included an

acknowledged illegitimate child. The Court in answering said question in the affirmative stated:

> "* * * An interpretation of the citizenship statute, then, to the effect that each of these children was the 'child' within the meaning of the statute, of an American citizen, in no way offends the mores of this Country, and we give the statute such an interpretation. It follows that the children were American citizens, * * *"

The aforesaid liberal construction of the meaning of the word "child" to include an acknowledged illegitimate child is indicative of the present trend to relax the harsh early common law rule and not punish the offspring for the offense of the parents. In said case an act of Congress gave certain rights of citizenship to "any child" whose father is a citizen of the United States. Such a right was of utmost importance to such child, and the Court's construction of the statute to include said acknowledged illegitimate child as a child of his citizen father gave said child the rights to which he was legally and morally entitled. Here an act of Congress has given certain rights of renewal of copyrights to a "child" of an author. In the *Compagnie* case, as here, the act in question did not define the word "child." There, as here, there was an acknowledgment of the child and no question of proof with respect thereto.

As previously maintained herein, one of the main purposes of Section 24 of the Copyright Act was to provide for the maintenance of the deceased author's dependents. The Court in *Turner v. Metropolitan Life Insurance Co., supra,* went on to state that cases construing statutes in which the term "child" had been defined would not be in point, since if there is a definition in the statute that defi-

nition would control. The Court in that case then concluded that

> "there being no words of limitation or restriction used in the policy in connection with the word 'children,' it agreed with the conclusion reached by the Trial Court that said word should be taken in its ordinary and popular sense (Civ. Code 1644) *which means all children of the insured.*" (Emphasis ours.)

It is respectfully submitted that the foundation of the common law policy which was the question of difficulty of proof is eliminated in the case of an *acknowledged child* such as we have here. In so far as the purpose of Section 24 of the Copyright Act is concerned, an acknowledged illegitimate child should be equally entitled to the benefits as a legitimate child. Certainly, the father has no less a duty to such child than to a legitimate child and such a child should receive the same benefits and protection of the law as a legitimate child. *The modern law as distinguished from the old common law so provides.*

It is further respectfully submitted that the case of *Middleton v. Luckenbach S. S. Co., supra,* in its reasoning and language is directly applicable to the present case and was not based on any substantial differences in language in the Federal Death Act as compared with the Copyright Act. The Court, in that case, emphasized that the inclusion of an illegitimate child within the purview of "decedent's wife, husband, parent, child or dependent relative" would carry out the purposes of the act, and to hold otherwise would defeat the purposes of the act. In words which are directly applicable to the instant case, the Court based its decision on the following:

> "There is no right of inheritance involved here. It is a statute that confers recovery upon dependents,

not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support."

By any present day standards the plaintiff, as the acknowledged and admitted child of Mr. DeSylva, was both legally and morally entitled to support to the same extent as though born in wedlock, and therefore, to carry out the purposes of the Copyright Act in question, *the common, ordinary and natural significance of the term "child"* should be taken, which would include plaintiff as a child of Mr. DeSylva within the meaning of said Copyright Act.

All rights sued for herein were specifically reserved in connection with and excepted from the compromise and settlement with the executors of the estate of George G. DeSylva, deceased, and the reference to the sum of $99,-000.00 in connection with the vast estate of the decedent, made on page 26 of the Transcript of Records is wholly immaterial to the issues herein involved and should be entirely disregarded.

The case of *Pfeifer v. Wright,* 41 F. 2d 464, cited by cross-appellant, has no pertinancy to the issues involved here. In that case the decedent died domiciled in Oklahoma and the question was whether the child in question would inherit with respect to Oklahoma property. The child was an illegitimate child and had been acknowledged in accordance with the law of Kansas. The Court held that the child was an heir with respect to property in Kansas but not with respect to property in Oklahoma.

Cross-appellant relies heavily upon the case of *Flood's Estate,* 217 Cal. 763, 21 P. 2d 579 (discussed on page 16 of Cross-appellant's Opening Brief), with respect to the

status of cross-appellee under the California law. Said case deals with legitimation under Section 230 of the Civil Code (a matter not determined here). The Supreme Court of California specifically stated in its opinion in said case that Probate Code Section 255 is not involved in said proceeding and that petitioner's claim therein was based upon legitimation under Section 230 of the Civil Code. In this cross-appeal, as previously set forth, the Trial Court did not base its judgment upon the disputed facts pertaining to legitimation under Section 230 of the Civil Code of the State of California; and in effect held that the undisputed facts, which included an acknowledgment within the meaning of Section 255 of the Probate Code of the State of California, were sufficient upon which to predicate its judgment to the effect that cross-appellee is a child of the deceased within the meaning of the statutes of the United States relating to copyrights.

In *In re Wehr's Estate,* 96 Mont. 245, 29 P. 2d 836, decided by the Supreme Court of Montana, it was held that,

> "Under statute, an *illegitimate child acknowledged by the father* is placed on the same footing as a legitimate child so far as right of inheritance of father's estate is concerned." (Emphasis ours.)

It is noteworthy that the statute there under consideration was very similar to Section 255 of the Probate Code of the State of California.

The reference by the cross-appellant to the case of *Wong v. Wong Hing Young,* 80 Cal. App. 2d 391, 181 P. 2d

741, has no apparent pertinency to this case. That case simply pointed out the distinction between an adoption as a legitimate child under Section 230 of the Civil Code of the State of California and the partial legitimation under Section 255 of the Probate Code.

E. The Law of the State of Residence of the Decedent, and Not the Common Law, Determines the Definition of "Children" in the Copyright Act, Which Does Not Contain a Definition of "Children."

The absence of a definition of "children" in the Copyright Act herein involved plainly indicates the purpose of Congress to leave the determination of that question to the state law, which in this case is the law of the State of California, the state of residence of the decedent at all times herein involved, and *not to the common law.*

The case of *Seaboard Air Line Ry. v. Kenney,* 240 U. S. 489, 492, involved the construction of the words "next of kin" as used in a Federal Employers Liability Act. Said act contained no definition of who are to constitute the next of kin to whom a right of recovery was granted. The Court in said case held that the "next of kin" for whose benefit an action under the Federal Employers Liability Act may be maintained, are those who are the next of kin *under the local law.*

The Supreme Court of the United States stated in said case, at pages 460 and 461:

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But, as speaking generally un-

der our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. * * *

"* * * The controversy was whether the word 'heirs' under the statute should be taken in its common-law meaning, and therefore not to give a right to complete the entry to illegitimate children who had been recognized by their father, the preemptor, and who were his heirs under the 'law of the state of Kansas, where the land was stipulated and where the deceased preemptor was domiciled. The court said: 'We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words 'heirs of the deceased preemptor' as used in the section to persons who would be heirs at common law (children not born in lawful matrimony being, therefore, excluded), rather than those who might be such according to the *lex rei sitae,* by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word 'heirs' would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. * * * Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was

thereby designed to be determined otherwise than by the law of the state which was both the situs of the land and the domicil of the owner,' pp. 68, 69. And there is no ground for taking this case out of the rule thus announced upon the theory that the controversy involved the title to real estate, contracts concerning which are governed by the law of the situs, since we are dealing here with the subject of next of kin, which, so far as legislative power is concerned, under our constitutional system of government, is inherently local and to be determined by the rules of the local law. * * * 'And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective states of the domicil of the original sufferers.'"

See also *Middleton v. Luckenbach S. S. Co.*, 70 F. 2d 326.

This Honorable Court in the case of *Weyerhaeuser Timber Co. v. Marshall* (C. C. A. 9, 1939), 102 F. 2d 78, had occasion to pass upon a situation involving an Act of Congress which lacked a definition of its terms and this Honorable Court stated in said case, at page 81:

"* * * The Act defines 'widow' as including only the 'decedent's wife.' Thus the conclusion as to whether a claimant is a 'widow' depends upon whether she previously was a 'wife'—a status left undefined by the Act, and thus under the doctrine of Seaboard Air Line Ry. v. Kenney, 240 U. S. 489, 492, 36 S. Ct. 458, 60 L. Ed. 762, to be solved by the application of state law. * * *"

F. In the Event This Honorable Court Finds That a Determination of the Additional Facts Pertaining to the Question of Whether or Not Cross-appellee Was Legitimated Within the Meaning of Section 230 of the Civil Code of the State of California Was and Is Necessary to Establish That Cross-appellee Is a Child Within the Meaning of the Statutes of the United States Relating to Copyrights, Then the Cross-appellee Is Entitled to a Trial on Said Additional Facts and the Case Should Be Sent Back to the Trial Court for Said Purpose.

As previously indicated, each party made a motion in the Trial Court for summary judgment based only upon the undisputed facts and each contended that under the undisputed facts they were entitled to judgment as a matter of law. The Trial Court made findings of fact based upon the undisputed facts and rendered judgment. The Trial Court did not (and under the circumstances and law relating to summary judgment, could not) attempt to determine any disputed fact; and the Trial Court in effect held that the undisputed facts were sufficient upon which to predicate judgment, including its aforementioned conclusion of law that cross-appellee is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

The additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California (in addition to the acknowledgment under Section 255 of the Probate Code of the State of California which is not challenged herein) being in dispute, were not determined by the Trial Court, the said Court holding in effect that such determination was not necessary in view of the Court's decision that the undisputed facts were sufficient to establish that cross-appellee is a child within the

meaning of the statutes of the United States relating to copyrights.

It follows from the foregoing, therefore, that in the event this Honorable Court finds that a determination of the additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California was and is necessary to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyrights, the cross-appellee is entitled to a trial on said additional facts and the case should be sent back to the Trial Court for said purpose. Cross-appellee, however, maintains that such determination was not necessary to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyrights, and that the undisputed facts before the Trial Court were sufficient to establish the judgment to said effect.

Conclusion.

The word "children" taken in its normal and ordinary sense definitely includes the cross-appellee, who was the acknowledged child of decedent. While it may be argued that the old common law rule was that the word "child" meant legitimate child, such restricted definition was confined strictly to cases of inheritance and was founded upon the desire to eliminate uncertainty in the question of heirship. The statute here in question is not one of inheritance but creates a new right directly in the widow and children of a deceased author. There is no question of proof in the case of an acknowledged child and it is without question in the instant case that the cross-appellee was the child of decedent. The acknowledged illegitimate

child is just as dependent upon his father as a legitimate child and has just as much right to the benefits of a law created for the advantage of a deceased author's children. The beneficial purpose of Section 24 of the Copyright Act would be in part defeated by a construction that would define the word "children" to exclude an *acknowledged illegitimate child.*

For the reasons mentioned, it is respectfully submitted that cross-appellant's appeal is not well taken and should be held for naught and that this Honorable Court should affirm the District Court's conclusion of law incorporated in the judgment to the effect that cross-appellee, Stephen William Ballentine, is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

Respectfully submitted,

MAX FINK,
CYRUS LEVINTHAL,
LEON E. KENT,
Attorneys for Appellant and Cross-appellee.

APPENDIX.

In the United States District Court in and for the Southern District of California, Central Division.

Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Plaintiff, vs. Marie DeSylva, Defendant. No. 14,400-T.

MEMORANDUM RE MOTIONS FOR SUMMARY JUDGMENT.

The motion of plaintiff for a summary judgment is denied.

The motion of defendant for summary judgment is granted.

Some considerable issue has been presented concerning the right of Stephen William Ballentine, for whose benefit this action was prosecuted, to be treated as a child of decedent George G. DeSylva. If said child is not a child within the meaning of the copyright statute which the Court has been called upon to construe, there would be no need for the Court to construe the statute or to determine the respective rights of the widow and child.

The Court has determined that the child is a child within the meaning of the copyright statutes.

Because defendant's Findings of Fact did not make this clear but were rather drawn on the theory that the child was not a child within the meaning of that law, the Court has re-drafted the Findings of Fact and Conclusions of Law, and Judgment. In so doing it has been the Court's intention to hold for defendant on the question of statutory construction. It has been the Court's intention to find the child Stephen William Ballentine to be a

child of decedent within the meaning of the copyright statutes. Whereas the Findings of Fact, Conclusions of Law, and Summary Judgment have thus been re-drafted by the Court, copies thereof are herewith transmitted to counsel for such action, if any, as they may deem advisable.

It Is Ordered that said Findings of Fact, Conclusions of Law, and Judgment be entered this 29th day of April, 1953.

ERNEST A. TOLIN,
United States District Judge.

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellee.

APPELLANT'S REPLY BRIEF.

MAX FINK,
CYRUS LEVINTHAL,
LEON E. KENT,
6253 Hollywood Boulevard,
Los Angeles 28, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

Where an Author Leaves Surviving a Widow and Child, the Copyright Act Permits Both to Participate as a Class in the Renewals of Copyrights Accruing After the Death of the Author.

The pertinent portions of Title 17, U. S. C., Section 24, providing for the renewal of copyrights, reads as follows:

"DURATION; RENEWAL AND EXTENSION.

"The copyright secured by this title shall endure for twenty-eight years from the date of first publi-

cation, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name. . . . *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, *or the widow, widower, or children of the author, if the author be not living,* or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. . . ." (Second emphasis ours.)

The language used in the aforesaid statute clearly indicates the intention of Congress that the widow or widower of an author is not to have priority on renewals of copyrights to the exclusion of the children of an author. A consideration of the objects and policy of said statute, as well as of equity and conscience, affirm such intention. Further, such intention is clearly and unequivocally demonstrated in said statute by unmistakably indicating the priority of each particular group or *class* entitled to the renewal privilege by the use of a qualifying phrase inserted between each group or *class. No such qualifying phrase is used or found in the act within the group or class of widow, widower, or children of the author.*

Thus, the aforesaid Act first gives the right of renewal to the author of such work, *if still living,* then to the widow, widower, or children of the author, by the qualify-

ing phrase *"if the author be not living,"* then to the author's executors, or in the absence of a will, his next of kin, by the qualifying phrase *"if such author, widow, widower, or children be not living."*

II.

The Word "or" in the Phrase "Widow, Widower, or Children of the Author Is Used in the Conjunctive Sense in the Copyright Act, and Any Other Construction Would Render Said Provision Repugnant to the Other Provisions of Said Statute and Be Contrary to the Intention of Congress.

Appellee claims that the words "widow, widower, or children of the author" were used in the Copyright Act in the disjunctive sense. It is respectfully submitted that such a contention is untenable and that such a construction would render the provision in question repugnant to the other provisions of the statute and be contrary to the intentions of Congress.

The intention of the Congress is to be sought for primarily in the language used and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture.

> *Thompson v. United States*, 246 U. S. 547, 551, 38 S. Ct. 349, 351, 62 L. Ed. 876.

The appellee would like to have the aforementioned portion of the Copyright Act interpreted as though it read substantially as follows:

> "That . . . the author of such work, if still living, or the widow or widower of the author, if the author be not living, or if such author, widow or

> widower be not living, the children of the author, or if such author, widow, widower, or children be not living, then the author's executors. . . ."

The difference between the Copyright Act as it actually reads, and the way the Appellee would like to have it construed as reading, is so obvious as to require no further elaboration thereon.

The cases cited by Appellee on pages 4 and 5 of her brief do not support her contention that the words "widow, widower, or children of the author" are used in the Copyright Act in the disjunctive sense. A reading of said cases clearly indicates that any other construction of the acts or matters therein involved would have been repugnant to the other portions thereof or to the obvious intent of the persons or matters involved in said cases. For example, in the case of *In re Rice* (U. S. C. A., D. C., 1947), 165 F. 2d 617, 619, cited by Appellee on page 4 of her brief, the term "common carrier" was used in the statute therein involved to include every person owning, operating, controlling, *or* managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire. The question there was whether a person coming within only one of said categories was covered by the Act. Obviously, if the term "common carrier" as used in said statute was interpreted to mean only those who were in *all* of the categories therein named, such a construction would have been repugnant to the other portions of the Act or to the obvious intent of Congress that the aforesaid term was used in the disjunctive sense.

Again, in *Travers v. Reinhardt,* 205 U. S. 423, 430, 51 L. Ed. 865, 869, cited by Appellee on pages 4 and 5

of her brief, the Court was called upon to construe a provision in a will "that if any of my sons should die *without leaving a wife or child or children at his death.*" The court was asked, by interpretation, to substitute the word "and" in place of "or" in the aforesaid phrase. The court said that looking at all of the provisions of the will, and ascertaining, as best it may, the intention of the testator, it perceived no reason for interpreting the words used by him otherwise than according to their ordinary natural meaning. It was clear in said case that the testator's intent was to use the aforesaid provision in the disjunctive sense. The Supreme Court in said case, speaking through Mr. Justice Harlan, merely affirmed a decree from the Court of Appeals, which had affirmed a decree of the Supreme Court of the District, which had confirmed a report of the auditor in a suit for partition. No interpretation of an Act of Congress was therein involved.

In *Gay Union Co. v. Wallace,* 71 App. D. C. 382, 387, 112 F. 2d 192, 197, cited by Appellee on page 4 of her brief, the Secretary of Agriculture was directed under an Act of Congress to make allotments of the sugar quota in a variety of circumstances. Several standards were to be taken into consideration by the Secretary of Agriculture. The Court there pointed out that since each of the factors stated in the Act were complete in itself, the word "or" merited its normal disjunctive meaning. It is respectfully submitted that in said case the obvious intent of Congress with respect to the use of the word "or" was in the disjunctive sense in that any one of the standards would suffice.

The case of *International Mercantile Marine Co. v. Lowe* (2d Cir. 1938), 93 F. 2d 663, 665, cited by Appellee on page 5 of her brief, is clearly against Appellee's posi-

tion. Although in said case the Court said that as used in the Longshoremen's Act, limiting total compensation for *injury or death,* the word "or" is a disjunctive particle signifying an alternative and that hence the Act limits *separately* the maximum compensation for disability and the maximum for death, two separate claims, one for compensation and one for death were approved because of the use of the word "or" and *thereby in effect giving said Act a disjunctive construction in Section 14(m) and a conjunctive construction* by *holding* that the Act allowed *both* maximums despite the use of the word "or" in the statute.

Likewise, in *In re 188 Randolph Building Corp.* (7th Cir., 1945), 151 F. 2d 357, 358, cited by Appellee on page 5 of her brief, the use of the word "or" in the Bankruptcy Act there in question was clearly intended by Congress to be construed in the disjunctive sense.

Appellee has cited the case of *Adolfson v. United States* (9th Cir., 1947), 159 F. 2d 883, 886, on page 5 of her brief. There the word "or" was used in a Criminal Statute and it clearly appears from the provisions of said Statute that the word "or" was used therein in the disjunctive sense, it covering therein several specifically named offenses.

In the instant case we have just the opposite situation. Here the intention of Congress that the word "or" in the phrase "widow, widower, or children of the author" was used in the conjunctive sense in the Copyright Act clearly appears from a reading of said Act.

Said intention of Congress becomes demonstrably clear when there is taken into consideration an earlier draft of said statute which read as follows:

> "That the copyright . . . may be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children. . . ."[1]

Appellee has based her contention that the widow or widower takes precedence over the children on the argument that the language referring to the group of "widow, widower, or children" employs the coordinating particle "or" and that such word is used in the disjunctive, meaning an alternative. In this connection we note, first, that "or" used as an alternative does not denote a priority unless we modify the language employed by reading into it some qualifying phrase such as "or if no widow or widower survive, then the children. . . ."[2] To do so would, of course, modify the language used in the statute by construction.

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[1]Section 19, H. R. 19853 and S. 6330, 59th Congress, First Session, entitled "A Bill to Amend and Coordinate the Acts Respecting Copyright."

[2]Webster's New International Dictionary, Second Edition, Unabridged, defines "or" as: "a coordinating particle that marks an alternative; as you may read or may write . . . it often connects a series of words or propositions presenting a choice of either; as he may study law *or* medicine *or* he may go into trade." Disregarding our feelings of what he should study, it is clear that the word "or" by itself indicates a choice and nothing more—it does not indicate which choice is preferable until language is added or read into the sentence to indicate that.

Secondly, it is well established that the *conjunctive and disjunctive* are signified by the use of the word "or" if to do so is consistent with the legislative intent.[3]

It is respectfully submitted that although in the cases cited by Appellee on pages 4 and 5 of her brief, the word "or" was construed in the disjunctive sense, said construction merely required the presence of only one of the alternative situations therein involved, and such construction did not in any manner result in the exclusion of or the taking of precedence over any of the other situations. So here, too, *either* the widow *or* the child of the author could apply for a renewal of a copyright, and whichever one obtained said renewal would hold the same in trust for the benefit of both, they *both being in the same class of entitlement.* Where one of a *class* entitled to a renewal of copyright obtains the renewal for himself, he holds the same in trust for the benefit of the entire class.[4]

Certainly the construction of the Copyright Act by those charged with the duty of executing said Statute is entitled to persuasive weight and ought not to be disregarded or ignored without cogent reasons. That agency in the instant case is the Copyright Office. As set forth in Appellant's Opening Brief, on pages 9 and 10, the Copyright Office has taken the position that the order of

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[3]*Union Starch and Refining Company v. N. L. R. B.* (7th Cir., 1951), 186 F. 2d 1008, 1014, *cert. den.* 342 U. S. 815, 72 S. Ct. 30, 96 L. Ed. 617, and cases therein cited; *Tyson v. Burton* (1930), 110 Cal. App. 428, 294 Pac. 750, 752.

[4]*Tobani v. Carl Fischer, Inc.* (2nd Cir., 1938), 98 F. 2d 57, *cert. den.* 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420; *Silverman v. Sunrise Pictures Corp., supra.* See also *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.* (2nd Cir., 1944), 140 F. 2d 266, 267; *Edward B. Marks Music Corp. v. Wonnell* (Dist. Ct., S. D. N. Y., 1945), 61 Fed. Supp. 722.

enumeration specified in the Statute is *by classes* and that the children and widow or widower are to be taken as a *single class* for renewal purposes; further, that the widow or widower does not take precedence over the children in asserting renewal claims; and that the benefits of the renewal are held as tenants in common so that if one of the class renews, he does it for the benefit of all.

Appellee has made reference to 13 C. J. page 1090, on page 7 of her brief. The footnote to said reference includes for its authority the Rules and Regulations for Registration of Claims to Copyright (Copyright Office Bul. No. 15), Rule 48. In that connection the Court's attention is respectfully invited to Appellant's references on pages 9, 10 and 11 of his Opening Brief to the excerpt from Circular No. 15 of the Copyright Office entitled "Instructions for Securing Registration of Claims to Renewal Copyright," and to the position set forth by George D. Cary, Principal Legal Advisor to Copyright Office, in letters sent to counsel for both parties herein.

It is respectfully submitted that the references on page 7 of Appellee's Brief, wherein they recite "in the order stated" or "in the order named," means *in the order of each class named or stated.*

Appellee has cited 34 *Am. Jur.* page 423, on pages 7 and 8 of her brief, which reads as follows:

> "The author of such work, if living, is entitled to the extension. If he is not living, the right exists in the author's widow, widower, or children if there is such, otherwise the extension may be secured by the author's executors, or, in the absence of a will, to his next of kin. In any case, however, an application for such renewal and extension must be made to the copyright office and duly registered therein, within

> one year prior to the expiration of the original term of the copyright. The purpose of the renewal provision in the copyright statute is to give to the persons enumerated in the order of enumeration a new right or estate not growing legally out of the original copyright property, but a new creation for the benefit, if the author is dead, of those naturally dependent upon, or properly expectant of, the author's bounty."

It clearly appears from a reading of the foregoing that the order of enumeration is in the sequence of *classes,* with the author's widow, widower, or children being in one single class *without any priority on renewals of copyrights in favor of one to the exclusion of the other.*

Appellee appears to rely heavily upon the case of *White-Smith Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247. Appellee refers to a certain inference that the person who takes on the death of the author is the widow. In said case there was no dispute between a widow and child of an author with respect to renewal rights of a copyright. Said action merely involved a claim by a publisher for a statutory extension and the Court limited the extension rights only to the classes enumerated. In fact, there is no indication that there were any children surviving the author, and any reference to widow in said decision would be mere dicta. Furthermore, where the Court in said case said, at page 250, that "this did in truth assume to vest the new right in the widow, *etc.* (emphasis ours) if the author was not living * * *," it was undoubtedly, by the use of the word "'etc.," including widow and children as a class.

Appellee has quoted, on pages 9 and 10 of her brief, from an opinion handed down by Assistant Attorney General Fowler. Said opinion was written in reply to an

inquiry concerning renewal of copyright by an assignee of the author. It is respectfully submitted that a reading of the language quoted from said opinion clearly shows a break-down by *classes,* with the widow and children being treated as *one class.*

Appellee has cited the case of *Silverman v. Sunrise Pictures Corp.* (2d Cir., 1921), 273 Fed. 909, on page 10 of her brief, as dealing with the question here involved. In said case, however, the author left no husband, children, or descendants of children surviving. Said case, therefore, did not involve any question of renewal rights of a widow or children. Said opinion did point out, however, that the renewal right is a new creation for the benefit (if the author be dead) of *those naturally dependent upon or properly expectant of the author's bounty.* There is nothing in said opinion which would indicate that if the widower and children had survived the author they would not have been treated as a class. The use of the words "in the order of their enumeration" meant treating each designated group as a class.

Appellee has cited certain portions of works on pages 12, 13 and 14 of her brief. It is respectfully submitted that the aforesaid portions of the works cited by Appellee either show an intent to regard a widow and children as being in one class with respect to renewal rights of copyrights, or do not deal with the specific question herein involved, or do not follow the wording of the act, or are unsupported by any authority for the position taken by Appellee that the surviving widow takes to the exclusion of the surviving child. As previously pointed out, the act in question *does not read* as claimed in some of the aforesaid works that if an author is dead the renewal may be made by his widow and that if there is no widow, by

his child. Neither does the act indicate in any manner whatsoever that an author's children cannot renew the term if the author's widow be living. While the act designates various groups entitled to renewal privileges, and contains qualifying phrases inserted between said groups, no such qualifying phrase is found within the group or class of "widow, widower, or children." This clearly indicates that no priority within the said group was ever intended by Congress. In fact, it would be repugnant to the other provisions of the statute and contrary to the intent of Congress if the surviving widow and child were not grouped together as a class.

Appellee has argued that certain problems would arise if it were assumed that the widow and children take as a class, and give as an example the problem of how the child or children would share with the surviving widow. It is respectfully submitted that said argument is not well taken. The examples given by Appellee do not present any insurmountable obstacles. Such situations have obviously obtained in innumerable instances wherein various intestate succession statutes have been involved. Be that as it may, in the instant case the author left surviving a widow and only one child, and there is no problem with respect to the share of each in the copyright renewals.

Appellee has urged that Appellant was not entitled to an accounting. It is respectfully submitted that Appellant's right to an accounting is a proper issue in this appeal, since the Appellant is equally entitled with Appellee to the right of renewals of the copyrights in issue. It

follows therefrom that where Appellee, as *one of a class* entitled to renewals of copyrights, obtain renewals for herself, and has been unjustly enriched to the extent of Appellant's rights and interest therein and share thereof, she holds the same in trust for the benefit of the *entire class, which includes Appellant.* As such a constructive trustee Appellee is obligated to and should account to Appellant.

Conclusion.

It is respectfully submitted that the language of the renewal section of the Copyright Act clearly spells out the intention of Congress to treat the surviving widow, widower, or children as a *class,* entitled to participate in renewals of copyrights, without any precedence of one over the other. Said intention becomes more apparent when the language used is viewed in the light of the policy and purposes of the renewal portion of the Copyright Act, which was for the benefit of those naturally dependent upon or properly expectant of the author's bounty. It cannot be said that a child, particularly one of tender years as is the Appellant, is less dependent upon or properly expectant of the author's bounty than is a widow. In view thereof neither is entitled to precedence over the other. Giving preference to the widow or widower would unjustly deprive the children of their rightful share in these copyrights.

For the reasons mentioned, it is respectfully submitted that the portion of the judgment of the Trial Court herein appealed from by Appellant should, therefore, be reversed,

and that it should be declared that so long as both Appellant and Appellee are alive, the widow and child are equally entitled to renew and share in copyrights originally obtained by George G. DeSylva, and that Appellee should account to Appellant with respect to those renewals already obtained by Appellee since the death of George G. DeSylva.

Respectfully submitted,

MAX FINK,
CYRUS LEVINTHAL,
LEON E. KENT,
Attorneys for Appellant.

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

CROSS-APPELLANT'S REPLY BRIEF.

PAT A. MCCORMICK,
PATRICK D. HORGAN,
FLOYD H. NORRIS,
905 Van Nuys Building,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Cross-Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

CROSS-APPELLANT'S REPLY BRIEF.

In reply to the brief of cross-appellee, attention is directed to paragraph 3 on page 3 thereof as to the alleged undisputed facts in the case.

It is submitted that the stipulations of facts [Tr. pp. 20-21] in the case go no further than to show that Stephen William Ballentine, a minor, was the son of

Marie Ballentine and George G. DeSylva, deceased, and that the decedent and Marie Ballentine were at no time husband and wife. In a statement of undisputed facts filed by the attorneys for plaintiff and cross-appellee [Tr. pp. 21-24], it is alleged that George G. DeSylva, deceased, acknowledged in writing that the cross-appellee was his son and that this was a sufficient acknowledgment to be within the provisions of Section 255 of the California Probate Code.

The first motion for summary judgment was filed on behalf of the cross-appellee on March 6, 1953 [Tr. p. 15] and the motion for summary judgment of the defendant and cross-appellant was filed on March 17, 1953 [Tr. pp. 24-27]. The cause was heard and arguments made thereon on the 10th and 14th day of April, 1953 [Tr. p. 29], and the case was submitted by cross-appellee upon the theory that an acknowledgment of the child within the provisions of Section 255 of the California Probate Code was sufficient to make Stephen William Ballentine a child of George G. DeSylva, deceased, within the provisions of Section 24, Title 17, United States Code.

Apparently, as an after-thought and possibly because of the belief that there was not a sufficient legitimation of Stephen William Ballentine to bring him within the term "children" as used in Section 24, Title 17, United States Code, Leon E. Kent, one of the attorneys for cross-appellee, filed on April 20, 1953, an affidavit in opposition to defendant's motion for summary judgment [Tr. pp. 27-29] in which, Mr. Kent alleges upon information and belief that the child had been legitimated within the meaning of Section 230 of the Civil Code of the State of California, and alleges further that such fact could be

established by his (affiant's) testimony to the fact that decedent had publicly acknowledged the child as his own and received him into his family and otherwise treated him as if he were a legitimate child.

This court's attention is expressly directed to that portion of Section 230 of the Civil Code of the State of California which requires that in addition to the other conditions therein stated, in order for a child to be legitimated under such section, such must be done *"with the consent of his wife."* (Emphasis ours.)

In view of the above facts, as disclosed by the record, it is respectfully submitted that paragraphs 3 and 5 on pages 3 and 4 of cross-appellee's brief are foreign to this appeal and should be disregarded.

Argument.

Space does not permit answering in detail each of the arguments made by counsel for cross-appellee. However, we shall endeavor to answer these arguments generally in the order in which they are made.

With reference to the first argument, counsel agrees that the meaning of a word may and often does change with the passage of time. However, it is respectfully submitted that in the determination of this case the court must interpret the meaning of the term "children" according to its legally accepted meaning in 1831, 1891 and 1909, and not the meaning of the word at it may be today, because from the history of Section 24, Title 17, United States Code, it appears that the right of renewal, which was given to the widow, or children, was first found in the Act of February 3, 1831. In general this same phrase, "widow or children" has survived and is

found in the amendment to the section of March 3, 1891, and the present section as passed on March 4, 1909. Most assuredly, counsel for cross-appellee will not contend that some 122 years ago Congress could foresee that the passage of time would have a tendency to broaden the term "child" or "children" and therefore it intended the term "children" to include illegitimate children in spite of the fact that it did not specifically so state and that the courts of that time, both in Great Britain and the United States, did not give such a meaning to the word.

Cross-appellee's next argument is addressed to the question that the harsh early common law rule has been relaxed by statute in various and sundry states. That this is true is not denied, but, however true that may be, it is submitted that it has no materiality upon the question as to whether or not Congress intended the word "children" to include illegitimate children as used in Section 24, Title 17, United States Code, in 1831, 1891 and 1909.

Counsel's next argument is in effect that under the laws of California the word "child" or "children" includes all children, legitimate or illegitimate, upon whom the law has conferred the capacity to inherit. This argument and the authorities cited in support thereof are inconsistent with the following argument as found on page 20 of the brief, in which counsel states:

> "Sec. 24 of Tit. 17, U. S. Code, is not a statute of inheritance but creates a new right."

That the statement of law just quoted is correct can hardly be disputed in view of the decisions of the federal courts in the following cases:

Silverman v. Sunrise Pictures Corp. (2d Cir., 1921), 273 Fed. 909, 911;

Fox Film Corp. v. Knowles (1921), 274 Fed. 731, 732;

Shapiro, Bernstein & Co., Inc. v. Bryan (2d Cir., 1941), 123 F. 2d 697, 700;

G. Ricordi & Co. v. Paramount Pictures (2d Cir., 1951), 189 F. 2d 469, 471.

Counsel for cross-appellee apparently places great weight upon the case of *Middleton v. Luckenbach S. S. Co.* (2d Cir., 1934), 70 F. 2d 326, on the theory that inasmuch as the mother of an illegitimate child and the illegitimate daughter of a mother were permitted to recover damages under the provisions of Sections 761 and 764, Title 46, United States Code, which provides in substance that the personal representative may maintain a suit for damages for the benefit of the decedent's wife, husband, parent, child or dependent relative. Therefore, the term "child" as used in this Act of Congress included illegitimate children.

Counsel, however, conveniently overlooks the language of Judge Manton at page 328, as follows:

> "Provision is made therein for the recovery by a parent, child, or dependent relative, and we must answer as to whether these words include parents of illegitimate children and illegitimate children.

> Taken in their ordinary meaning, as distinguished from their legal meaning, they are parent, child, and dependent relative. *The word 'child' is defined in legal dictionaries as meaning a 'legitimate child.'* Bouvier's Law Dictionary, vol. 1, p. 479." (Emphasis ours.)

In the *Middleton* case, it was clearly held that there was no right of inheritance involved, therefore, the court must look to the federal statute and not to local state law in order to determine who may recover. The court concludes that in view of the numerous legislative enactments and decisions permitting illegitimates to inherit and recover as the next of kin to the mother, necessarily Congress must have intended to confer upon illegitimate children the right to recover as a dependent relative under the provisions of Sections 741 and 746, Title 46, United States Code.

This same decision has been cited to the effect that the term "child" or "children" when used alone in a legislative act refers only to a legitimate child.

In addition, the facts in the *Middleton* case are clearly distinguishable from the facts of this case, because here we are dealing with the illegitimate child of a deceased father and there it was the illegitimate child of a deceased mother, and the court will take judicial notice of the fact that the relationship between the father and the illegitimate child, with reference to inheritance and otherwise, is entirely different from that of a mother and her illegitimate child.

While there is no case directly deciding the question as to whether or not the term "children" as used in Section 24, Title 17, United States Code, includes illegitimate children, there is a very enlightening case decided by the

Ninth Circuit in 1928, being the case of *Louie Wah You v. Nagle,* 27 F. 2d 573, in which it was determined that the term "children" as used in Section 6, Title 8, United States Code, did not include an illegitimate child unless such child had been legitimated in accordance with the provisions of Section 230 of the California Civil Code. There, the child who was seeking admission to the United States was admittedly the son of an American citizen who had been married to applicant's mother while he resided in China. The court held, however, that this marriage was invalid inasmuch as applicant's father had been previously married and was a resident of California and had never brought applicant to the United States, received him into his family with the consent of his first wife, and therefore applicant was an illegitimate child and was not included within the term "children" as used in Section 6, Title 8, United States Code.

Attention is directed to the fact that Section 6, Title 8, United States Code, was passed in 1802, amended in 1855, and again in 1907. It is respectfully submitted that inasmuch as this Circuit has defined the term "children," being the identical word used in Section 24, Title 17, United States Code, its definition of the word "children" is binding upon the court in the case at issue.

In further support of the decision of the Ninth Circuit in the construction of the term "children" as including only legitimate children, see:

In re Dragoni (Wyo. 1939), 79 P. 2d 465.

in which case the court, at page 469, used the following language:

> "* * * The cases, texts and law dictionaries are practically unanimous in declaring that *prima facie*

> the word 'children' in a statute means legitimate children. The rule is applied even in private writings. It was in a will case (Wilkinson v. Adam, 1 Ves. & Bea. 422, 462, 35 Eng. Rep. 179) that Lord Eldon used this emphatic language: 'The rule cannot be stated too broadly that the description, "child, son, issue," every word of that species, must be taken *prima facie* to mean legitimate child, son or issue.' * * *"

The next argument presented by cross-appellee is to the effect that the law of the state of residence of the decedent and not the common law governs the definition of the term "children" as used in Section 24, Title 17, United States Code. In support of this contention, counsel cite the case of *Seaboard Airline Ry. v. Kenney,* 240 U. S. 491, 36 Sup. Ct. 458, 60 L. Ed. 762. That case, however, was distinguished in the *Middleton v. Luckenbach S. S. Co.* case, 70 F. 2d 326, at pages 328-329, in which the court clearly held that they could not look to the state laws to determine what Congress meant when it used the term "child" or "next of kin" with reference to an interpretation of Section 761, Title 46, United States Code. It is respectfully submitted that the reasoning of the *Middleton* case is not only very persuasive, but certainly it was not intended by Congress that in one state an illegitimate child should have the right to renew the copyright and that in another state he could not.

It is respectfully submitted that throughout the argument presented to this court by cross-appellee with respect to the status of the ward as a child, cross-appellee has failed to distinguish between the import of Sections 255 and 230 of the Civil Code of the State of California. It is clear that we are not here concerned with a question of

inheritance. Therefore, legitimation under the provisions of Section 255 of the Probate Code of California is of no importance and utterly foreign to the issue.

Thus, it was incumbent upon cross-appellee to establish that the child had been legitimated under the provisions of Section 230, which it is clear has not been done even though we give full credence and import to the extraneous affidavit of Leon Kent, because as we have pointed out, it has not even been so much as suggested that cross-appellant, *the wife of the father of the illegitimate child,* ever gave her consent to its legitimation.

Conclusion.

It is respectfully submitted that the term "children" as used in Section 24, Title 17, United States Code, applies only to legitimate children, that such was the use of the term at the time of the enactment of said section by Congress and that in view of the legal definitions of the term and its uses at that time, this court must find that the cross-appellee was not a child of the deceased within the provisions of said section.

It is therefore submitted that the judgment of the trial court should be reversed in so far as it held that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the provisions of Section 24, Title 17, United States Code.

Respectfully submitted,

PAT A. MCCORMICK,
PATRICK D. HORGAN,
FLOYD H. NORRIS,
Attorneys for Cross-Appellant.

No. 13887

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JEWEL HAWKINS,
Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska, Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff:

BELL & SANDERS,

Central Building,
Anchorage, Alaska.

For Defendant:

No appearance by Defendant.

For Intervenor:

SEABORN J. BUCKALEW,

United States Attorney,
Anchorage, Alaska,

ARTHUR D. TALBOT,

Assistant United States Attorney,
Anchorage, Alaska.

In the District Court for the Territory of Alaska,
Third Division

No. A-6011

JEWEL HAWKINS, Plaintiff,

vs.

LAWRENCE SAVAGE, doing business as Lee Savage Painting Company,

Defendant.

COMPLAINT

Comes now the above-named plaintiff, and for her causes of action against the above-named defendant, alleges and states, as follows:

First Cause of Action

Plaintiff for her first cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about August 18, 1949, the defendant issued his check on the Bank of Alaska of Anchorage, Alaska, to Bob Campbell for work and labor performed, in the sum of thirty dollars ($30.00), being then and there indebted to the said Bob Campbell for said sum, and thereafter, Bob Campbell endorsed his name on the back of said check as payee, and the plaintiff cashed said check, a copy of which is hereto attached, Marked Exhibit "A", and made a part hereof by reference as fully as if set out in full herein, thereby pay-

ing to Bob Campbell thirty dollars ($30.00), believing said check to be good, and that the said defendant did have in the Bank of Alaska, adequate funds to pay said check.

II.

Plaintiff further alleges that she endorsed said check, and obtained payment therefor, from the Northern Commercial Company, an Alaskan corporation, and the Northern Commercial Company in due time presented said check to the Bank of Alaska for payment, and the payment thereof was refused with the notation marked thereon, "account closed", and this plaintiff was then required to pay to the Northern Commercial Company, the said thirty dollars ($30.00) and take up said check, and she is now the owner and holder thereof, and that said check has not been paid, and that by reason thereof, the defendant is justly indebted to this plaintiff in the sum of thirty dollars ($30.00), together with interest thereon at the rate of six per cent (6%) per annum from August 18, 1949, on this, her first cause of action.

Second Cause of Action

Plaintiff for her second cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Dominick Farino for work and labor per-

formed, in the sum of twelve dollars and forty seven cents ($12.47), and did on said date, utter, issue, execute, and sign and deliver his check to the said Dominick Farino for the sum of $12.47, a copy of said check with all endorsements thereon, is hereto attached, marked Exhibit "B", and made a part hereof by reference as fully as if set out in full herein. That thereafter this plaintiff believing said check to be good, paid the said Dominick Farino said sum upon his endorsing on the back of said check, his name. That thereafter this plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same, and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter the Northern Commercial Company demanded of the plaintiff that she repay them the sum of $12.47, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the said sum of $12.47, and that she is now the owner and holder of said check, in due course, and is entitled to recover of and from the defendant, the sum of $12.47, which is now due and owing to the plaintiff, on this, her second cause of action, together with interest thereon at the rate of six per cent (6%) per annum from the 20th day of August, 1949, until paid.

Third Cause of Action

Plaintiff for her third cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on the 26th day of August, 1949, uttered, issued, signed, and delivered his check to this plaintiff, Jewel Hawkins, in the sum of two thousand dollars ($2000.00), and the said Jewel Hawkins, the plaintiff herein, did on said date, cash said check to the full extent of two thousand dollars. That the plaintiff, believing said check to be good, accepted the same, and endorsed it to Ted McHenry, who paid her said sum of money, and the said Ted McHenry, in due course, cashed said check at the store of the Northern Commercial Company, and did obtain thereon, cash to the extent of $2000.00; that in due course and within a reasonable time thereafter, the Northern Commercial Company endorsed said check, and presented the same for payment to the Bank of Alaska, the bank said check was drawn on, and the Bank of Alaska refused payment thereof, and marked said check "NSF", meaning not sufficient funds, and returned said check to the Northern Commercial Company. Thereafter, the Northern Commercial Company demanded this plaintiff to take said check up, and pay them the sum of $2000.00, the amount of said check, and this plaintiff did, and she is now the owner and holder thereof, in due course, and is entitled to recover of and from the defendant, the sum of $2000.00, the amount due on said check, plus

six per cent (6%) per annum from the 26th day of August, 1949, until paid, on this, her third cause of action.

A copy of said check for $2000.00, together with all endorsements thereon, is hereto attached, marked Exhibit "C", and made a part hereof, by reference as fully as if set out herein in full.

Fourth Cause of Action

Plaintiff for her fourth cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Dominick Farino for work and labor performed, in the sum of thirty eight dollars and forty nine cents ($38.49) and did on said date, utter, issue, execute, sign, and deliver his check to the said Dominick Farino for the sum of $38.49, a copy of said check with all endorsements thereon is hereto attached, marked Exhibit "D", and made a part hereof by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Dominick Farino said sum upon his endorsing on the back of said check, his name. That thereafter, this plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check

to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same, and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter, the Northern Commercial Company demanded of the plaintiff that she repay them the sum of $38.49, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $38.49, and that she is now the owner and holder of said check, in due course, and is entitled to recover of and from the defendant, the sum of $38.49, together with interest thereon at the rate of six per cent (6%) per annum from the 20th day of August, 1949, which is now due and owing to this plaintiff, on this, her fourth cause of action.

Fifth Cause of Action

Plaintiff for her fifth cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Charles Wallen for work and labor performed, in the sum of forty three dollars and forty four cents ($43.44), and did on said date, utter, issue, execute, sign, and deliver his check to the said Charles Wallen for the sum of $43.44, a copy of said check is hereto attached, with all endorsements

thereon, marked Exhibit "E", and made a part hereof by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Charles Wallen said sum upon his endorsing on the back of said check, his name. That thereafter the plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter, the Northern Commercial Company demanded of the plaintiff that she repay them the sum of $43.44, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $43.44, and that she is now the owner and holder of said check, in due course, and is entitled to recover of and from the defendant, the sum of $43.44, together with interest thereon at the rate of six per cent per annum from the 20th day of August, 1949, which is now due and owing this plaintiff, on this, her fifth cause of action.

Sixth Cause of Action

Plaintiff for her sixth cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Charles Wallen for work and labor performed, in the sum of one hundred and nine dollars and ninety five cents ($109.95) and did on said date, utter, issue, execute, sign, and deliver his check to the said Charles Wallen for the sum of $109.95, a copy of said check with all endorsements thereon is hereto attached, marked Exhibit "F", and made a part hereof by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Charles Wallen said sum upon his endorsing on the back of said check, his name. That thereafter, the plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter, the Northern Commercial Company demanded of the plaintiff that she repay them the sum of $109.95, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $109.95, and that she is now the owner and

holder of said check, in due course, and is entitled to recover of and from the defendant, the sum of $109.95, together with interest thereon at the rate of six per cent per annum from the 20th day of August, 1949, which is now due and owing this plaintiff on this, her sixth cause of action.

Seventh Cause of Action

Plaintiff for her seventh cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Roger Anderson for work and labor performed, in the sum of forty one dollars and eighty four cents ($41.84), and did on said date, utter, issue, execute, and sign and deliver his check to the said Roger Anderson for the sum of $41.84, a copy of said check with all endorsements thereon is hereto attached, marked Exhibit "G", and made a part hereof by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Roger Anderson said sum upon his endorsing on the back of said check, his name. That thereafter, this plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank

on which the check was drawn for payment, and the bank refused the same and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter, the Northern Commercial Company demanded of the plaintiff that she repay them the sum of $41.84, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $41.84, and that she is now the owner and holder of said check, in due course, and is entitled to recover of and from the defendant, the sum of $41.84, together with interest thereon at the rate of six per cent (6%) per annum from the 20th day of August, 1949, which is now due and owing to this plaintiff, on this, her seventh cause of action.

Eighth Cause of Action

Plaintiff for her eighth cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Roger Anderson for work and labor performed, in the sum of twelve dollars and forty seven cents ($12.47), and did on said date, utter, issue, execute, sign, and deliver his check to the said Roger Anderson for the sum of $12.47, a copy of said check with all endorsements thereon is hereto attached, marked Exhibit "H", and made a part

hereof by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Roger Anderson said sum upon his endorsing on the back of said check, his name. That thereafter, this plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same, and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter, the Northern Commercial Company demanded of the plaintiff that she repay them the sum of $12.47, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $12.47, and that she is now the owner and holder of said check in due course, and is entitled to recover of and from the defendant, the sum of $12.47, together with interest thereon at the rate of six per cent per annum from the 20th day of August, 1949, which is now due and owing to this plaintiff, on this, her eighth cause of action.

Ninth Cause of Action

Plaintiff for her ninth cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an in-

dividual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Frank Orokos for work and labor performed, in the sum of twelve dollars and forty seven cents ($12.47), and did on said date, utter, issue, execute, and sign and deliver his check to the said Frank Orokos for the sum of $12.47, a copy of said check with all endorsements thereon is hereto attached, marked Exhibit "I", and made a part hereof by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Frank Orokos said sum upon his endorsing on the back of said check, his name. That thereafter, this plaintiff cashed said check at the store of the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same, and entered its notation thereon, "NSF", meaning, not sufficient funds, and immediately thereafter, the Northern Commercial Company demanded of this plaintiff that she repay them the sum of $12.47, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $12.47, and that she is now the owner and holder of said check in due course, and is entitled to recover of and from the defendant, the sum of $12.47, together

with interest thereon at the rate of six per cent per annum from the 20th day of August, 1949, which is now due and owing to this plaintiff, on this, her ninth cause of action.

Tenth Cause of Action

Plaintiff for her tenth cause of action, alleges and states:

I.

That the defendant, Lawrence Savage, is an individual doing business as Lee Savage Painting Company of Alaska, and on or about the 20th day of August, 1949, the said defendant was justly indebted to Frank Orokos for work and labor performed, in the sum of forty dollars and seventy four cents ($40.74), and did on said date, utter, issue, execute, and sign and deliver his check to the said Frank Orokos for the sum of $40.74, a copy of said check with all endorsements thereon is hereto attached, marked Exhibit "J", and made a part hereof, by reference as fully as if set out in full herein. That thereafter, this plaintiff, believing said check to be good, paid the said Frank Orokos said sum upon his endorsing on the back of said check, his name. That thereafter, this plaintiff cashed said check at the Northern Commercial Company, and the said Northern Commercial Company in due course of business and within a reasonable time thereafter, presented said check to the Bank of Alaska for payment, being the bank on which the check was drawn for payment, and the bank refused the same, and entered its notation thereon,

"NSF", meaning, not sufficient funds; and immediately thereafter, the Northern Commercial Company demanded of this plaintiff that she repay them the sum of $40.74, the amount of said check, and take the same back as her property, and in compliance with said demand, she did pay the said Northern Commercial Company the sum of $40.74, and that she is now the owner and holder of said check in due course, and is entitled to recover of and from the defendant, the sum of $40.74, together with interest thereon, at the rate of six per cent per annum from the 20th day of August, 1949, which is now due and owing to this plaintiff, on this, her tenth cause of action.

Wherefore, plaintiff prays that she may recover on her first cause of action, the sum of $30.00, together with interest thereon at the rate of six per cent per annum, from the 18th day of August, 1949, for work and labor performed.

That she may recover on her second cause of action, the sum of $12.47, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her third cause of action, the sum of $2000.00, together with interest thereon at the rate of 6% per annum from the 26th day of August, 1949, until fully paid.

That she may recover on her fourth cause of action, the sum of $38.49, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her fifth cause of action, the sum of $43.44, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her sixth cause of action, the sum of $109.95, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her seventh cause of action, the sum of $41.84, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her eighth cause of action, the sum of $12.47, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her ninth cause of action, the sum of $12.47, together with interest thereon at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover on her tenth cause of action, the sum of $40.74, together with interest thereon, at the rate of 6% per annum from the 20th day of August, 1949, for work and labor performed.

That she may recover all costs of this action, including a reasonable attorney's fee for plaintiff's attorney.

/s/ BAILEY E. BELL,
Attorney for Plaintiff.

EXHIBIT "A"

Bank of Alaska 59-20
Anchorage, Alaska, Aug. 18, 1949. No.....

Pay to the Order of Bob Campbell.....$30.00
Thirty no/100.....Dollars.
Counter Check
"Acc't closed"
/s/ Lawrence Savage

Endorsements on the back of the check:
1. Bob Campbell.
2. Jewel Hawkins.
3. Pay to the Bank of Alaska Anchorage, Alaska or order Northern Commercial Company. 58
Pay to the Order of Northern Commercial Co.

EXHIBIT "B"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

To Bank of Alaska, Anchorage, Alaska 59-5
No. 2137
Aug. 20, 1949
Pay Twelve 47/100 Dollars.....$12.47
To the Order of: Dominick Farino
Lee Savage Painting Co.
By /s/ Lawrence Savage
(N.S.F.)

Endorsements on the back of the check:
1. Dominick Farino.
2. Jewel Hawkins.
3. Pay to the order of Northern Commercial Co.

EXHIBIT "C"

Lee Savage Painting Co. of Alaska
P. O. Box 1686, Anchorage, Alaska

No. 2147
Aug. 26, 1949

To Bank of Alaska, Anchorage, Alaska 59-5
Pay Two Thousand Dollars.....$2000.00
To the order of Jewell Hawkins.

Lee Savage Painting Co.
By /s/ Lawrence Savage

(N.S.F.)

Charge Material

Endorsements on the back of the check:

1. Jewel Hawkins.
2. Ted McHenry.
3. Pay to the order of Northern Commercial Co.

EXHIBIT "D"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2141
Aug. 20, 1949

To Bank of Alaska, Anchorage, Alaska, 59-5.
Pay Thirty Eight 49/100 Dollars.....$38.49
To the order of Dominick Farino

Lee Savage Painting Co.
By /s/ Lawrence Savage

(N.S.F.)

Endorsements on the back of the check:

1. Dominick Farino.
2. Jewel Hawkins.
3. Pay to the order of Northern Commercial Co.

EXHIBIT "E"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2138
August 20, 1949

To Bank of Alaska, Anchorage, Alaska 59-5.

Pay Forty Three 44/100 Dollars.....$43.44
To the order of Charles Wallen

Lee Savage Painting Co.
By /s/ Lawrence Savage
(N.S.F.)

EXHIBIT "F"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2134
Aug. 20, 1949

To Bank of Alaska, Anchorage, Alaska, 59-5.

Pay One Hundred and Nine 95/100 Dollars $109.95
To the Order of Charles Wallen

Lee Savage Painting Co.
By /s/ Lawrence Savage
(N.S.F.)

Endorsements on the back of the check:

1. Charles Wallen.
2. Jewel Hawkins.
3. Pay to the order of Northern Commercial Co.

EXHIBIT "G"

Lee Savage Pointing Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2139
Aug. 20, 1949

To Bank of Alaska, Anchorage, Alaska, 59-5.
Pay Forty One 84/100 Dollars.....$41.84
To the order of Roger Anderson
Lee Savage Painting Co.
By /s/ Lawrence Savage
(N.S.F.)

Endorsements on the back of the check:

1. Roger Anderson.
2. Jewel Hawkins.
3. Pay to the order of Northern Commercial Co.

EXHIBIT "H"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2135
Aug. 20, 1949

To Bank of Alaska, Anchorage, Alaska, 59-5.
Pay Twelve 47/100 Dollars.....$12.47
To the order of Roger Anderson
Lee Savage Painting Co.
By /s/ Lawrence Savage
(N.S.F.)

Endorsements on the back of the check:

1. Roger Anderson.
2. Jewel Hawkins.
3. Pay to the order of the Northern Commercial Co.

EXHIBIT "I"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2136
Aug. 20, 1949

To Bank of Alaska, Anchorage, Alaska, 59-5.
Pay Twelve 47/100 Dollars.....$12.47
To the order of Frank Orokos

Lee Savage Painting Co.
By /s/ Lawrence Savage

(N.S.F.)

Endorsements on the back of the check:

1. Frank Orokos.
2. Jewel Hawkins.
3. Pay to the order of Northern Commercial Co.

EXHIBIT "J"

Lee Savage Painting Co. of Alaska
P.O. Box 1686, Anchorage, Alaska

No. 2140
Aug. 20, 1949

To Bank of Alaska, Anchorage, Alaska, 59-5.
Pay Forty 74/100 Dollars.....$40.74
To the order of Frank Orokos

Lee Savage Painting Co.
By /s/ Lawrence Savage

(N.S.F.)

Endorsements on the back of the check:

1. Frank Orokos.
2. Jewel Hawkins.
3. Pay to the order of Northern Commercial Co.

[Endorsed]: Filed Feb. 27, 1950.

[Title of District Court and Cause.]

AFFIDAVIT FOR ATTACHMENT

United States of America,
Territory of Alaska, Third Division—ss.

I, Shrader Hawkins, being first duly sworn, upon my oath say: That I am the attorney in fact for the Plaintiff named in the above-entitled action; that the Defendant in said action is indebted to Plaintiff in the sum of ($2341.87) two thousand three hundred forty one dollars and eighty-seven cents, over and above all legal setoffs and counterclaims upon unpaid checks contract for the direct payment of money, and that the payment of the same has not been secured by mortgage, lien or pledge upon real or personal property. That the sum of two thousand three hundred forty-one dollars and eighty-seven cents ($2341.87) for which the attachment is asked herein is an actual, bona fide, existing debt, due and owing from the Defendant to the Plaintiff, and the attachment herein is not sought nor the action prosecuted to hinder, delay or defraud any creditor of the Defendant.

/s/ SHRADER HAWKINS

Subscribed and sworn to before me, this 27th day of February, 1950.

[Seal] /s/ BAILEY E. BELL, Jr.,
Notary Public, Territory
of Alaska.

[Endorsed]: Filed Feb. 27, 1950.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Bailey E. Bell, plaintiff's attorney, whose address is 213 Central Bldg., Anchorage, Alaska, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated February 28, 1950.

[Seal] M. E. S. BRUNELLE,
Clerk of the District Court.
/s/ By CHARLES M. KNOTT,
Deputy Clerk.

U.S. Marshal's Return attached.

[Title of District Court and Cause.]

ATTACHMENT WRIT

The President of the United States of America:

To the Marshal of the Territory of Alaska, Division No. 3, or to his Deputy, Greeting:

Whereas, Jewel Hawkins, by her attorney in fact, Shrader Hawkins, has complained that Lawrence Savage, doing business as Lee Savage Painting Company, is justly indebted to her in the amount of two thousand three hundred forty-one dollars and eighty-seven cents ($2341.87) and the neces-

sary affidavit and undertaking herein having been filed as required by law.

We Therefore Command You, That you attach and safely keep all the property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the Plaintiff's demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of said Plaintiff herein. And of this writ make due service and return.

Witness, The Honorable Anthony J. Dimond, Judge of said Court and the seal thereof affixed at Anchorage, in said Territory, this 28th day of February, 1950.

[Seal] M. E. S. BRUNELLE,
Clerk.
/s/ By CHARLES M. KNOTT,
Deputy Clerk.

U.S. Marshal's Return attached.

NOTICE OF ATTACHMENT

To: Warren Cuddy and Wendell Kay doing business as Cuddy & Kay; Bank of Alaska, by serving E. A. Rasmuson; J. B. Warrack, by serving Leonard Thomas; Paddock's Paint Shop, by serving Harold Paddock; and R. W. Jackson.

You will please take notice, that all moneys, goods, credits, effects, debts due or owing, and all other personal property in your possession, or under your control, belonging to the defendant named

in the Writ, of which the annexed is a true copy, are attached by virtue of said Writ, and you are hereby notified not to pay over or transfer the same to anyone but myself. Please furnish a statement of all cash, credits, deposits, or other things of value that you have under your control, or in your hands.

Dated this 27th day of February, 1950.

PAUL HERRING,
U.S. Marshal,
/s/ By D. A. CARLQUIST,
Deputy.

Money due to defendant $2341.87.
Other property: None.
Declared by J. B. Warrack Co.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO INTERVENE

Comes now the United States of America by Ralph E. Moody, Assistant United States Attorney, and moves the court for leave to intervene in the above-entitled action on the grounds and for the reason that the United States of America has priority over the assets of the defendant, Lawrence Savage for payment of taxes by virtue of Sections 191 and 192, Title 31, U.S.C.A., and recorded liens as more fully appears in the affidavit attached hereto.

/s/ RALPH E. MOODY,
Assistant United States Attorney

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Ralph E. Moody, being first duly sworn upon his oath deposes and says:

That I am the Assistant United States Attorney, Third Division, Territory of Alaska, and the attorney for the United States of America.

That I am reliably informed by A. Verle Collar, Deputy Collector of Bureau of Internal Revenue, Anchorage, Alaska, and based upon such information believe the fact to be that Lawrence Savage owes the United States of America the following described taxes:

1. Withholding Tax For the Taxable Year Ending Sept. 30, 1949.....$2837.09
   Employment Tax F. I. C. A. For The Taxable Year Ending Sept. 30, 1949.... 483.75

   Total Tax.....$3320.84

of the above total, the said Lawrence Savage has paid Six Hundred Eight Dollars and Ninety-four Cents ($608.94), leaving a balance of tax owed the United States a sum of Two Thousand Seven Hundred Eleven Dollars and Ninety Cents ($2711.90) plus interest at the rate of six (6) percent per annum from date due until paid, plus a

filing fee of Three Dollars and Fifty Cents ($3.50) incurred by the United States for filing a lien against the property of the said Lawrence Savage.

2. Withholding Tax For The Taxable Year Ending June 16, 1950..... $ 505.90
Employment Tax F. I. C. A. For The Taxable Year Ending June 16, 1950.. 126.57

Total Tax Owed The United States....$ 632.47

plus interest at the rate of six (6) percent per annum from date due until paid, plus a filing fee of Three Dollars and Fifty Cents ($3.50) incurred by the United States for filing the lien against the assets of the said Lawrence Savage.

That the assets of the said Lawrence Savage have been attached by process of law by virtue of an attachment filed in this cause on the 27th day of February, 1950, and that by virtue of said attachment, the United States of America is entitled to priority of payment of the above stated taxes by virtue of Sections 191 and 192, Title 31, U.S.C.A.

That the United States of America has filed tax liens for the amounts above stated in the Anchorage Recording Precinct, Anchorage, Alaska, as more fully appears in the copies of Notice of Tax Lien Under Internal Revenue Laws which are attached hereto as Exhibits "A", and "B" and by reference made a part hereto as if fully set out herein. Attached hereto is a proposed Complaint of Intervention.

Wherefore, the United States of America asks

leave to intervene herein to protect its rights and file this Complaint of Intervention.

/s/ RALPH E. MOODY,
Assistant United States Attorney.

Subscribed and sworn to before me this 9th day of August, 1950.

/s/ CHARLES M. KNOTT,
Deputy Clerk.

Acknowledgment of Service attached.

EXHIBIT A

Form 668—Rev. Nov. 1943 (Copy)
Treasury Department, Internal Revenue Service

NOTICE OF TAX LIEN UNDER INTERNAL REVENUE LAWS

No. 17153 June 12, 1950

United States Internal Revenue,
District of Washington

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or

liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer: Lawrence J. Savage DBA Lee Savage Painting Company.

Residence or place of business: Box 2468, Anchorage, Alaska.

Nature of Tax	Year or Taxable Period Ended	Date Assessment List Received	Amount of Assessment
Withholding	9-30-49	12-27-49	2837.09
Employment: FICA	9-30-49	12-27-49	483.75
		Filing Fee	3.50
		Total	3324.34

CLARK SQUIRE, Collector
/s/ By FRANK J. HEALY,
Deputy Collector in Charge

Certificate of Officer Authorized by Law to Take Acknowledgments

[Printer's Note: Not filled out.]
To: U. S. Commissioner, Anchorage, Alaska.

Filed this 13th day of June, 1950, at 11:30 a.m. Signed Rose Walsh, Clerk.

EXHIBIT B

Form 668—Rev. Nov. 1943 (Copy)
Treasury Department, Internal Revenue Service

NOTICE OF TAX LIEN UNDER INTERNAL REVENUE LAWS

No. 17255 June 23, 1950
United States Internal Revenue,
District of Washington.

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalities) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer: Lawrence J. Savage DBA Savage Painting Co.

Nature of Tax	Year or Taxable Period Ended	Date Assessment List Received	Amt. of Assessment
Withholding	4-1-50—6-16-50	Tel Recd 6-22-50	505.90
Employment-FICA	4-1-50—6-16-50	Tel Recd 6-22-50	126.57
		Filing Fee	3.50
		Total	635.97

CLARK SQUIRE, Collector
/s/ By RALPH A. NOERENBERG,
Deputy Collector in Charge

Certificate of Officer Authorized by Law to Take Acknowledgments

[Printer's Note: Not filled out.]

To: U. S. Commissioner, Anchorage, Alaska.

Filed this 28th day of June, 1950, at 3 p.m. Signed Rose Walsh, Clerk.

[Title of District Court and Cause.]

HEARING ON MOTION FOR LEAVE TO INTERVENE

Now at this time hearing on motion for leave to intervene in cause No. A-6011 entitled Jewel Hawkins, Plaintiff, versus Lawrence Savage d/b/a Lee Savage Painting Co., Defendant, came on regularly before the Court. The reporting waived and Ralph E. Moody, Assistant United States Attorney appeared for and in behalf of the Government. Bailey E. Bell appeared for and in behalf of the plaintiff, the Defendant not being present nor represented the following proceedings were had to-wit:

Argument to the Court was had by Ralph E. Moody, for and in behalf of the Government.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the Plaintiff.

Argument to the Court was had by Ralph E. Moody, for and in behalf of the Government.

Whereupon the Court having heard the arguments of the respective counsels and being fully and duly advised in the premises, reserved decision.

Entered in Journal Sept. 15, 1950.

[Title of District Court and Cause.]

M.O. GRANTING MOTION FOR LEAVE TO INTERVENE

Now at this time arguments on motion for leave to intervene having been had heretofore and on the 15th day of September, 1950 in cause No. A-6011, entitled Jewel Hawkins, Plaintiff, versus Lawrence Savage d/b/a Lee Savage Painting Co., Defendant, and the court having reserved its decision,

Whereupon the Court now grants leave to intervene and complaint in intervention filed and parties given 15 days to plead to complaint in intervention.

Entered in Journal Sept. 21 1950.

[Title of District Court and Cause.]

COMPLAINT OF INTERVENTION

Comes now the United States of America, Intervenor herein, after leave of the court first had and obtained, and for its first cause of action against the above-named plaintiff and defendant, alleges as follows:

I.

That on the 27th day of February, 1950, the above-entitled action was commenced by Jewel Hawkins, an individual, against the defendant herein and there issued from this court a Writ of Attachment which thereafter was returned on the 27th day of February, 1950, showing that the assets of defendant, Lawrence Savage, in the amount of Two Thousand Three Hundred Forty One Dollars and Eighty-seven Cents ($2341.87) in the hands of J. B. Warrack & Company had been attached.

II.

That at all times hereinafter mentioned the Intervenor, the United States of America. was, and now is, a corporation sovereign and body politic.

III.

That the United States of America at the time of the commencement of said suit by Jewel Hawkins against the defendant, Lawrence Savage, had a lien of record against the defendant for withholding tax for the period ending September 30, 1949, in the amount of Two Thousand Eight Hun-

dred Thirty Seven Dollars and Nine Cents ($2837.09), and employment taxes, F.I.C.A. for the period ending September 30, 1949, in the amount of Four Hundred Eighty Three Dollars and Seventy-five Cents ($483.75). The total amount of tax due of Three Thousand Three Hundred Twenty Dollars and Eighty-four Cents ($3320.84), of which sum the amount of Six Hundred Eight Dollars and Ninety-four Cents ($608.94), has subsequently been paid, leaving a total amount due the United States of America for taxes as above set out, of Two Thousand Seven Hundred Eleven Dollars and Ninety Cents, plus interest at the rate of six (6) percent per annum from date due until paid, plus filing fee in the amount of Three Dollars and Fifty Cents ($3.50) incurred by the United States of America for filing the tax lien in the Anchorage Recording Precinct in Anchorage, Alaska. Copy of said lien of record and assessment for taxes is attached hereto as Exhibit "A" and by reference made a part hereof as if fully set out herein. Said tax and interest is due and payable to the United States prior to the rights of the Plaintiff by virtue of Sections 191 and 192, Title 31, U.S.C.A.

The United States of America for its second cause of action against the above-named plaintiff and defendant alleges as follows:

I.

That the Intervenor, the United States of America, by reference incorporates paragraphs one (1) and two (2) of the First Cause of Action hereto-

fore stated as part of its Second Cause of Action as if fully set out herein.

II.

That the Intervenor, the United States of America, subsequent to commencement of said suit by Jewel Hawkins against the defendant, Lawrence Savage, acquired a lien against all the assets of the defendant, Lawrence Savage, for unpaid withholding tax for the taxable period ending June 16, 1950, in the amount of Five Hundred Five Dollars and Ninety Cents ($505.90), and employment tax F.I.C.A., for the taxable period ending June 16, 1950, in the amount of One Hundred Twenty Six Dollars and Fifty-seven Cents $126.57) by filing a lien of record in the Anchorage Recording Precinct, Anchorage, Alaska, for said sum of Six Hundred Thirty Two Dollars and Forty-seven Cents ($632.47) which amount is still owed the United States of America, plus a filing fee in the amount of Three Dollars and Fifty Cents ($3.50), incurred by the United States for filing said lien, plus interest on the amount of Six Hundred Thirty Two Dollars and Forty-seven Cents ($632.47), at the rate of Six (6) Percent per annum from date due until paid; said tax and interest is due and payable to the United States prior to the rights of the plaintiff by virtue of Sections 191 and 192, Title 31, U.S.C.A. Copy of said assessment covering said tax and lien of record of the Intervenor is attached hereto as Exhibit "B" and made a part hereof as if fully set out herein.

Wherefore, the United States of America prays:

Judgment on its First Cause of Action in the amount of Two Thousand Seven Hundred Eleven Dollars and Ninety Cents ($2711.90), plus interest at the rate of six (6) percent per annum from date due until paid plus Three Dollars and Fifty Cents ($3.50) filing fee.

Judgment on its Second Cause of Action in the amount of Six Hundred Thirty Two Dollars and Forty-seven Cents plus six (6) percent interest per annum from date due until paid plus Three Dollars and Fifty Cents ($3.50) filing fee.

That the United States of America be granted its costs incurred in this action.

That the United States of America be granted such other relief as the Court deems just and proper.

/s/ RALPH E. MOODY,
Assistant United States Attorney.

[Printer's Note: The attached Notice of Tax Lien Under Internal Revenue Law are duplicates of Exhibits A and B set out in full at pages 29-32 of this printed Record.]

Duly Verified.

Acknowledgement of Service attached.

[Endorsed]: Filed Sept. 21, 1950.

[Title of District Court and Cause.]

ORDER AUTHORIZING AND DIRECTING SERVICE BY PUBLICATION

Upon reading the affidavit of the plaintiff duly signed and filed in this action and upon an examination of the files and records in said case; it satisfactorily appears that the defendant is not in the Territory of Alaska, and cannot be served with summons in said Territory, and that this Court has jurisdiction of personal property in the Territory of Alaska to-wit: $2,341.87, said funds being in the hands of J. B. Warrack, subject to being paid into Court, and being paid out in compliance with orders of this Court; that a good cause of action in favor of the plaintiff and against the defendant is stated in the complaint and supplemental complaint filed herein. It further appearing that due diligence has been made to ascertain the whereabouts of the defendant and that the best information plaintiff is able to acquire, is that he now resides in Oakland, California.

That the plaintiff has made proper showing so as to entitle her to make service on the defendant by publication as by law provided.

It is therefore ordered, on motion of Bailey E. Bell, attorney for plaintiff, that service of summons in this action may be made on the defendant, by publication, the same to be published in the Anchorage Daily News, a newspaper published in the City of Anchorage, Alaska, which is hereby

designated as the newspaper most likely to give a notice to the defendant, and said publication to be made for four consecutive weeks, and that a copy of the first publication together with a copy of the complaint and supplemental complaint be mailed to the defendant at his last known address, or served on the Defendant Lawrence Savage.

Dated at Anchorage, Alaska, this 30th day of Oct., 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed Oct. 30 1950.

[Title of District Court and Cause.]

SUMMONS

To: Jewel Hawkins, Plaintiff, Lawrence Savage, d/b/a Lee Savage Painting Company, Defendant.

You are hereby summoned and required to serve upon the United States Attorney, Third Division, District of Alaska, Intervenor's attorney, whose address is Room 126, Federal Building, Anchorage, Alaska, an answer to the Complaint of Intervention which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judg-

ment by default will be taken against you for the relief demanded in the Complaint of Intervention.

[Seal] M. E. S. BRUNELLE,
Clerk of Court,
/s/ By CLARK RHODES,
Deputy Clerk.

Dated at Anchorage, Alaska, this 1st day of November, 1950.

U.S. Marshal's Returns attached.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

AFFIDAVIT TO OBTAIN SERVICE BY PUBLICATION

United States of America,
Territory of Alaska—ss.

Shrader Hawkins, being first duly sworn upon oath, deposes and says: That he is acting for Jewel Hawkins, his wife, who is the plaintiff above-named, by reason of a duly executed power of attorney, and that he is representing her under said power of attorney in the handling of the above-entitled case.

That suit was filed and summons issued out of the above-entitled Court and cause on the 28th day of February, 1950; that an attachment bond was filed together with an affidavit for attachment, and that a writ of attachment was also filed; and that

said attachment along with a notice of attachment was duly served on each of the following named persons: Warren Cuddy and Wendell Kay, doing business as Cuddy & Kay; Bank of Alaska by serving E. A. Rasmusson; J. B. Warrack, by serving Leonard Thomas; Paddock's Paint Shop by serving Harold Paddock; and R. W. Jackson, and Stanley McCutcheon and Buell A. Nesbett, doing business as McCutcheon & Nesbett; and that in compliance with said attachment and notice of attachment, J. B. Warrack answered that he was holding funds due the defendant in excess of two thousand three hundred forty one dollars and eighty seven cents ($2,341.87), and was holding same subject to the further order of this Court; and that said funds are attached at this time.

Affiant further states that this is one of the cases wherein service by publication may be had; that the defendant has property in the hands of J. B. Warrack which has been attached and is subject to be used in the payment of the debt herein sued upon; that the defendant has departed from the Territory of Alaska with intent to defraud his creditors, and to avoid the service of summons and now resides, so this affiant is informed and believes, in Oakland, California. That the plaintiff has and claims a lien on said $2,341.87 by reason of said sum having been attached; and that service on the defendant cannot be made in the Territory of Alaska; that said defendant is not in the Territory of Alaska; that property, to-wit: $2,341.87, has been seized by the Court and is now attached and

subject to the orders of this Court, and the plaintiff wishes to obtain service by publication as by law required.

/s/ SHRADER HAWKINS

Subscribed and sworn to before me this 28th day of Oct., 1950.

[Seal] /s/ BAILEY E. BELL,
Notary Public, Territory of Alaska. My Commission Expires Jan. 28, 1953.

[Endorsed]: Filed Oct. 30, 1950.

[Title of District Court and Cause.]

MOTION FOR ORDER OF DEFAULT

Comes now the United States of America, Intervenor herein, by and through J. Earl Cooper, United States Attorney, and moves the Court for an Order of Default herein against the plaintiff, Jewel Hawkins, and the defendant, Lawrence Savage, d/b/a Lee Savage Painting Company, on the ground and for the reason that Intervenor herein filed a Complaint of Intervention against the plaintiff Jewel Hawkins and the defendant Lawrence Savage, d/b/a Lee Savage Painting Company, on the 21st day of September, 1950, after leave of Court first had; that copy of said Complaint of Intervention was served on the above-named plaintiff on the 10th day of August, 1950, and on the defendant on the 14th day of November, 1950, as

more fully appears from the record herein; that the plaintiff Jewel Hawkins and the defendant Lawrence Savage, d/b/a Lee Savage Painting Company have not filed an answer or any pleading whatsoever in answer to said Complaint of Intervention within 30 days after service of said Complaint upon them and have not, up until the date of this motion, given any notice of intention to answer the Intervenor's Complaint.

Dated at Anchorage, Alaska, this 6th day of May, 1952.

/s/ J. EARL COOPER,
United States Attorney.

Acknowledgment of Service attached.

[Endorsed]: Filed May 8, 1952.

[Title of District Court and Cause.]

LEVY

Lien No. 17255, No. 17153

United States of America,
State of Washington

To: Clerk of the U. S. District Court (In re: Lee Savage Painting Company vs. Jewel Hawkins). At Anchorage, Alaska.

You are hereby notified that there is now due, owing, and unpaid from Lawrence J. Savage, DBA Lee Savage Painting Company, Anchorage, Alaska, to the United States of America the sum of Three

Thousand Eight Hundred Seventy & 20/100 Dollars ($3,870.20) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Tacoma, Washington, this 18th day of December, 1951.

[Seal] CLARK SQUIRE,
Collector of Internal Revenue
/s/ By RALPH A. NOERENBERG,
Deputy Collector in Charge

[Endorsed]: Filed Feb. 1, 1952.

Form 69— (Copy)

WARRANT FOR DISTRAINT

U. S. Treasury Department
Internal Revenue Service
(Revised Nov. 1949) No. 51-06839 EMT

Lawrence J. Savage DBA Lee Savage Painting Co., Anchorage, Alaska.

FICA 6-16-50 Final—Dec. 51 298020

Re-Transferred from 1st Dist. of California

Date of First Notice: 6-23-50. Debits: T 126.57. Unpaid Balance: 126.57. Penalty of 5 percent. $6.33.

To....., Deputy Collector.

Whereas, in pursuance of the provisions of the acts of Congress relating to internal revenue, the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named above, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; And Whereas, 10 days have elapsed since notice served and demand made upon said person or persons for payment of said tax or taxes; And Whereas, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement above, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes afore-

said. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Witness my hand and official seal at Tacoma, Washington, this 18th day of December, 1951.

/s/ CLARK SQUIRE,
Collector of Internal Revenue, District of Washington

Form 69— (Copy)

WARRANT FOR DISTRAINT

U. S. Treasury Department
Internal Revenue Service
(Revised Nov. 1949) No. 51-1088 WT

Lawrence J. Savage DBA Lee Savage Painting Co., Anchorage, Alaska

WT 9-30-49—Dec. 51 298019

Re-Transferred from 1st District of California
Date of First Notice: 12-28-49.

Date: 6-7-50. Debits: T 2809.00, I 28.09. Credits: 88.30. Unpaid Balance: 2748.79. Penalty of 5 percent $2837.09—$141.85.

To....., Deputy Collector.

Whereas, in pursuance of the provisions of the acts of Congress relating to internal revenue, the above-named person or persons is or are liable to pay

the tax or taxes assessed against him, or them, in the amount or amounts named above, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; And Whereas, 10 days have elapsed since notice served and demand made upon said person or persons for payment of said tax or taxes; And Whereas, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement above, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Witness my hand and official seal at Tacoma, Washington, this 18th day of December, 1951.

/s/ CLARK SQUIRE,
Collector of Internal Revenue, District of Washington

Form 69— (Copy)

WARRANT FOR DISTRAINT

U. S. Treasury Department
Internal Revenue Service
(Revised Nov. 1949) No. 51-1089 WT

Lawrence J. Savage DBA Lee Savage Painting Co., Anchorage, Alaska.

WT 6-16-50 Final—Dec. 51 298020
Re-Transferred from 1st District of California

Date of First Notice: 6-23-50. Debits: T 505.90. Unpaid Balance: 505.90. Penalty of 5 percent, $25.30.

To....., Deputy Collector.

Whereas, in pursuance of the provisions of the acts of Congress relating to internal revenue, the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named above, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; And Whereas, 10 days have elapsed since notice served and demand made upon said person or persons for payment of said tax or taxes; And Whereas,

said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement above, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Witness my hand and official seal at Tacoma, Washington, this 18th day of December, 1951.

/s/ CLARK SQUIRE,
Collector of Internal Revenue, District of Washington

[Printer's Note: The attached Notice of Tax Liens Under Internal Revenue Laws are dupplicates of Exhibits A and B sent out in full at pages 29-32 of this printed Record.]

[Title of District Court and Cause.]

MOTION FOR ORDER OF DEFAULT

Comes now the above named plaintiff, Jewel Hawkins, and moves the Court to enter an order of default herein against the defendant, Lawrence Savage, d/b/a Lee Savage Painting Company and for grounds of this motion states: That this action was duly filed on or about the 27th day of February, 1950; that an attachment was issued and certain funds were attached as the property of the defendant; that thereafter the Summons issued at the filing of the case was returned nulla bona due to the fact that the defendant was not in the Territory of Alaska; and that thereafter affidavit for the purpose of procuring permission to get service by publication was duly filed and that order was made directing service by publication for and on behalf of the plaintiff, and that service was duly perfected on the defendant, and that the time has long since expired for the defendant to plead or answer the plaintiff's amended and supplemental Complaint, and that said defendant is now in default.

This motion is based upon the records and files in this cause.

Dated at Anchorage, Alaska, this 23rd day of May, 1952.

BELL & SANDERS,
/s/ By BAILEY E. BELL,
Of Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 23, 1952.

[Title of District Court and Cause.]

ORDER OF DEFAULT

This matter coming on to be heard on the plaintiff's motion for an order of default, and the Court being fully advised in the premises finds the motion well taken.

Now, therefore, an order of default as to the defendant Lawrence Savage, d/b/a Lee Savage Painting Company, is hereby granted and ordered.

Dated at Anchorage, Alaska, this 6th day of June, 1952.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed June 6, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION FOR ORDER OF DEFAULT

Now at this time hearing on motion for order of default in cause No. A-6011, entitled Jewel Hawkins, Plaintiff, versus Lawrence Savage, d/b/a Lee Savage Painting Company, Defendant, came on regularly before the Court, J. Earl Cooper, United States Attorney, appearing for the Government, Intervenor, and Bailey E. Bell, appearing for and in behalf of the plaintiff. The following proceedings were had, to-wit:

Argument to the Court was had by J. Earl Cooper,

United States Attorney, for and in behalf of the Intervenor.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the plaintiff.

Argument to the Court was had by J. Earl Cooper, United States Attorney, for and in behalf of the Intervenor.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises directs plaintiff to file Answer to complaint in intervention.

Entered in Journal June 27, 1952.

[Title of District Court and Cause.]

ANSWER OF PLAINTIFF JEWEL HAWKINS TO COMPLAINT OF INTERVENTION

Comes now Jewel Hawkins, plaintiff above named, and first having obtained leave of the Court so to do, files this, her Answer to the Complaint of Intervention filed for and on behalf of the United States of America, Intervenor, and for answer to said complaint admits, denies and alleges as follows, to-wit:

I.

Admits that the plaintiff did commence the above-entitled action as an individual against the defendant named above, and did on that date cause an attachment to be issued, on which attachment $2,341.87 was attached in the hands of J. B. Warrack

& Company by the United States Marshal of this District as the property of the defendant.

II.

Plaintiff admits the allegations of Paragraph II.

III.

Plaintiff is not sufficiently informed of the truth or falsity of the allegations in paragraph III of said Complaint in intervention, and therefore denies said allegations, and the whole thereof, and asks that said Intervenor be held to strict proof thereof.

In answer to Intervenor's Second Cause of Action, plaintiff alleges and states as follows:

I.

This plaintiff, for answer to paragraph I of the Intervenor's Second Cause of Action, adopts and makes her answer thereto the same as previously answering said paragraph I and II, as above set forth.

II.

Plaintiff, for answer to paragraph II of the Intervenor's Second Cause of Action, not being sufficiently advised so as to form an opinion as to the truth or falsity of said allegations, denies the same, and the whole thereof, and asks that the Intervenor be held to strict proof thereof.

III.

Plaintiff specifically denies that if the Intervenor is entitled to a judgment for any sum against the defendant Lawrence Savage, d/b/a Lee Savage Painting Company, that said judgment should be

prior to the judgment that the plaintiff is entitled to in this case, and affirmatively alleges that her lien on the attached property referred to as being in the hands of J. B. Warack & Company is a first and prior lien in her favor against said money, and states that she is entitled to have said money appropriated and applied to the payment of her judgment against the defendant and prior to any right that the Intervenor has herein.

Wherefore, plaintiff having fully answered the complaint in intervention, prays that she recover as in her original complaint set forth and that the amount of her recovery be declared prior and superior to any right of the Intervenor insofar as the same affects the attached money referred to in the complaint in intervention and as shown by the records in this case; that the Intervenor, United States of America, recover no judgment which would in any way affect the plaintiff's rights to hold and receive the attached money above referred to or any part thereof.

Dated at Anchorage, Alaska, this 27th day of June, 1952.

BELL & SANDERS,
/s/ By BAILEY E. BELL,
Of Attorneys for Plaintiff.

Acknowledgment of Service.

Duly Verified.

[Endorsed]: Filed June 27, 1952.

[Title of District Court and Cause.]

M. O. SETTING CAUSE FOR TRIAL

Now at this time upon Court's own motion,

It is ordered that cause No. A-6011, entitled Jewel Hawkins, plaintiff, versus Lawrence Savage, doing business as Lee Savage Painting Company, defendant, be, and it is hereby, set for trial at 11:00 o'clock a.m. this date.

Entered in Journal Sept. 17, 1952.

[Title of District Court and Cause.]

TRIAL BY COURT

Now at this time cause No. A-6011, entitled Jewel Hawkins, plaintiff, versus Lawrence Savage, doing business as Lee Savage Painting Company, defendant, United States of America, intervenor, came on regularly for trial, the plaintiff not present, but represented by Bailey E. Bell of her counsel, the defendant not being present nor represented by counsel, Intervenor of United States of America not represented, and defendant's default having been duly and regularly entered on the 17th day of September, 1952, the following proceedings were had, to-wit:

Opening statement to the Court was had by Bailey E. Bell for and in behalf of the plaintiff.

Opening statement to the Court was had by Thomas R. Winter for and in behalf of the Government.

A packet of 14 checks all signed by Lawrence Savage was duly offered, marked and admitted as plaintiff's Exhibit 1.

Bailey E. Bell for and in behalf of the plaintiff moved for default judgment as against defendant Lawrence Savage.

Motion was granted.

Two copies of Notice of Tax Liens under Internal Revenue Laws Nos. 17153 and 17255 was duly offered, marked and admitted as Intervenor's Exhibit "A".

A certificate of assessments and payments in re. Lawrence J. Savage, Lee Savage Painting Co. was duly offered, marked and admitted as Intervenor's Exhibit "B".

All of the papers in the official Court file concerning the attachment: affidavit of attachment, writ of attachment, notice of attachment as to J. B. Warrack Co., undertaking on attachment and the return on affidavit of attachment was duly offered, marked and admitted as Intervenor's Exhibit "C" and are to remain in the Court file.

A notice of levy, dated 6/12/50, on J. B. Warrack Co., by Collector of Internal Revenue was duly offered, marked and admitted as Intervenor's Exhibit "D".

A notice of levy, dated 6/30/50, on J. B. Warrack Co., by Collector of Internal Revenue was duly offered, marked and admitted as Intervenor's Exhibit "E".

Copy of a levy on J. B. Warrack Company by Collector of Internal Revenue was duly offered,

marked and admitted as Intervenor's Exhibit "F".

Intervenor's Exhibits D, E, F to be substituted by copies.

Plaintiff is given 15 days to file brief.

Intervenor given 15 days to file reply briefs.

Whereupon the Court being fully and duly advised in the premises, it would reserve its decision.

Entered in Journal Sept. 17, 1952.

[Title of District Court and Cause.]

OPINION

Bell & Sanders, Anchorage, Alaska, Attorneys for Plaintiff.

No appearance by Defendant.

Seaborn J. Buckalew, United States Attorney, Anchorage, Alaska, Attorney for Intervenor.

This is a contest between the plaintiff suing and attaching to recover indebtedness due to her from the defendant and the United States coming in as an intervenor and seeking to collect taxes due to it from the defendant by application of the attached property. The property attached and upon which the intervenor seeks to enforce its lien, is in the sum of $2,341.87 in money owing from the garnishee, J. B. Warrack Co., to the defendant. It is not asserted or suggested that any other property is involved.

Priority turns upon the sequence of the various

actions taken and upon the nature and effect of the attachment as governed by the general tax laws and the laws concerning attachments in the Territory of Alaska. The chronological sequence may be stated as follows:

December 27-28, 1949: Assessment lists received by the Collector of Internal Revenue and notices and demands made upon defendant taxpayer, Lawrence Savage, covering withholding and Federal Contributions Act taxes due for the quarter ended 9/30/49 in the principal sum of $2,711.90, plus penalties, interests and costs legally due thereon.

February 27, 1950: Plaintiff Jewel Hawkins commenced this action against the defendant taxpayer, Lawrence Savage, seeking to recover on NSF checks issued by the defendant in the sum of $2,341.87 plus costs and attorneys' fees, and filed an undertaking and attachment and affidavit for attachment and writ of attachment was issued.

April 19, 1950: Writ of attachment served on J. B. Warrack Co., garnishee, who made return saying that said J. B. Warrack Co. held money in the sum of $2,341.87, due to the defendant, Lawrence Savage.

June 12, 1950: Notice of levy for taxes due the United States in the principal sum of $2,969.05 was served on J. B. Warrack Co. by the Collector of Internal Revenue.

June 13, 1950: Notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska.

June 22, 1950: Second assessment list was re-

ceived by the Collector of Internal Revenue and notice and demand was made on the defendant, Lawrence Savage, covering withholding and Federal Insurance Contributions Act taxes due for the period ended June 16, 1950, in the sum of $632.47.

June 30, 1950: Second notice of tax lien was filed with the United States Commissioner, Anchorage, Alaska.

June 30, 1950: Second notice of levy was served on J. B. Warrack Co., covering second assessment of $632.47.

J. B. Warrack Co., as recited above, acknowledges that it is indebted to the defendant, Lawrence Savage, in the total sum of $2,341.87, but in view of this litigation, the Company has retained possession of the money to be paid out to the person designated by the Court, or will pay the same into Court in this action upon the order of the Court. The plaintiff's claim against defendant is taken as confessed by default and the Court has ordered entry of judgment in favor of the plaintiff and against the defendant for the amount claimed but has deferred determination as to the status of the fund attached.

The Government asserts priority under the following quoted provisions of the Federal Statutes:

"Whenever any person indebted to the United States is insolvent, * * * the debts due the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, con-

cealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 USC 191 (Sec. 3466, Rev. Stat.).

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 USC 3670.

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." 26 USC 3671.

"(a) Such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice has been filed by the collector:

(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) In the office of the clerk of the United States district court for the judicial district in which the property subject to lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; * * *" 26 USC 3672.

Section 3466 R.S. embraced in Title 31, Sec. 191,

USC, needs no extended consideration. This applies only to insolvent debtors. There is nothing in the pleadings in this case to indicate insolvency of the defendant, Lawrence Savage, even though one may guess from the facts stated that he may well be and have been insolvent. As early as 1828, in Conard vs. Atlantic Insurance Company of New York, 26 U.S. 355, the Supreme Court held that mere inability to pay debts is not insolvency within the meaning of this statute, and that insolvency must be manifested in one of the three ways listed above in Section 3466. The same Court expressed the same view in Bramwell vs. U.S. Fidelity Co., 269 U.S. 483 (1926). A discussion of Government priority for taxes may be found in 9 Merten's Laws of Federal Income Taxation, 573 et seq. In the absence of any allegation of insolvency, no further consideration need be given to the possible application of 3466, except as incidental to the force and effect of Title 26, Sections 3670, 3671 and 3672, USC, also quoted above.

Coming now to the three sections of Title 26 mentioned, we may first consider the plaintiff's contention that the liens were improperly recorded in the Commissioner's Office. That argument is clearly without merit. Plaintiff says that the Territorial law makes no provision for filing such liens in any other office, and therefore, the only proper place for filing is that of the Clerk of the United States District Court. The answer lies in the Act of the Territorial Legislature of 1933, Chapter 94 of the Session Laws of Alaska of that year, carried

forward into Chapter 9, Title 48, Section 48-9-1 et seq. Alaska Compiled Laws Annotated, 1949. The title of the Act is "An Act authorizing the notices of liens for taxes payable to the United States of America and certificates discharging such liens and to make uniform the laws relating thereto." The Treasury Department has indicated its approval of this procedure. I.T. 2894, C.B. XIV-1, page 239.

The Government's claims of liens were filed in the Office of the United States Commissioner and ex-officio Recorder for the Anchorage Precinct, Third Judicial Division, Territory of Alaska, and there was no need for additional filing in the Office of the Clerk of the District Court.

The plaintiff urges that there is no pleading or proof of demand for the payment of the tax by the intervenor which appears to be indispensable under Sec. 3670. While no demand is pleaded, the proof adequately shows demand, and under the liberal provisions of Rule 15 of the Federal Rules of Civil Procedure, the complaint in intervention may be considered as amended to embrace the averment of demand. To dispose of the case upon lack of demand because not pleaded would scarcely be in harmony with the elementary principles of justice. The demand must have been made because it was sufficiently proved.

That brings us to the really crucial point, that is, whether the attachment made by the plaintiff of the money due the defendant in the hands of the garnishee should take priority over the lien of the

intervenor, United States, arising under Section 3670 et seq., supra.

Counsel for the intervenor urge that the Government's lien arose when the assessment lists were received by the Collector of Internal Revenue on December 27, 1949, and that despite the additional provisions of law contained in Sections 3671 and 3672, that lien is entitled to priority and must prevail against any attachment made at a later date. Indeed the Government's claim is so far-reaching as to require that all adverse claims whether in favor of a mortgagee, pledgee, purchaser or judgment creditor, as set out in Section 3672, must yield to the priority of the lien of the United States arising under Section 3670 if that lien arose or came into being at a date prior in time to the origin of any "valid" claim made by any person under 3672. To sustain such a theory it would be necessary to contradict the force and effect of the legislative history of the statutes mentioned. Sec. 3672 was enacted to protect what are commonly known as innocent purchasers for value, the word "purchasers" embracing all those classes of persons who may deal in the property of a debtor while other and secret liens against that property may exist. Neither the decision of the Supreme Court in United States vs. Security Trust and Savings Bank of San Diego, 340 U.S. 47 (1950) nor that of our own Court of Appeals in Alexander MacKenzie vs. United States, 109 F (2d) 540 (1940) sustains such a view of the law. In fact, the inferences to be rightly drawn from Judge Stev-

ens' opinion in the MacKenzie case leads one to the opposite conclusion. Two recent cases are deserving of note, Sunnyland Wholesale Furniture Co. vs. Liverpool & London & Globe Ins. Co., (D.C.N.D. Texas, Oct. 1952) 107 F. Supp. 405, and U.S.A. vs. Acri, (D.C.N.D. Ohio, Oct. 1952) Commerce Clearing House Standard Federal Tax Reporter, Sec. 9104, p. 47108.

This is one of the numerous cases where definitions of words and terms may be not only helpful but decisive. Some thousands of years ago, the Chinese sage and philosopher, Confucius, pointed out and emphasized not only the high desirability but the overriding need of exact definitions when considering matters of law. When asked as to the first reform he would introduce upon taking up the management of Government, it is reported that he replied, "I would begin by defining terms and making them exact." Perhaps even now that is not only good philosophy but also sound law.

For our present requirements, an adequate review of the legislative history of Sections 3670, 3671 and 3672 is to be found in Justice Jackson's concurring opinion in the Security Trust and Savings Bank case, supra, and so we know that Sec. 3671 and Sec. 3672 were enacted to give relief from the manifestly unjust effects of the rigid application of Sec. 3670.

Arrival at a correct conclusion will be speeded by defining two words, "arise" and "valid" used in the relevant statutes. In Sec. 3671, reference is made to the date when the "lien shall arise". What

is meant by the word "arise"? The answer is relatively simple. A lien "arises" at the time it comes into being or is created. Another word might have been used by the draftsman but the word "arise" brings about no difficulty.

However, in Sec. 3672, we find that "such liens shall not be valid" as against certain categories of persons or parties until "notice has been filed with the Collector", thus we must determine what is meant by the word "valid". Common knowledge as well as the dictionaries tell us that the word "valid" has several meanings. Bouvier says, "Having force; of binding force; legally sufficient or efficacious; authorized by law". The Oxford English Dictionary gives in part the following: "Good or adequate in law; possessing legal authority or force; legally binding or efficacious". In Ballentine we find, "Effective; operative; not void; subsisting; sufficient in law". And coming last to Webster's International Dictionary, the definition of "valid" includes, "having legal strength or force; * * * legally sufficient or efficacious; incapable of being rightfully overthrown or set aside * * *."

The reasonable conclusion, therefore, is that the lien created by Sec. 3670, which arises at the time the assessment list is received by the Collector as set out in Sec. 3671, has no binding force, no legal authority, is not legally sufficient or efficacious, and lacks the authority of law unless and until it is recorded as provided in Sec. 3672. This is not a mere exercise in logomachy or semantics, or akin to the sometimes disputed visions of telekinesis, but the in-

evitable conclusion attained through resort to exact definition in order to determine the construction that should rightfully and logically be placed upon the terms used by a legislative body in making law on a subject of consequence.

It is therefore here held that the plaintiff in this action is entitled to prevail if she falls within one of the categories of persons who are protected by Section 3672. Without any extended citation of authority or resort to the pholosophical niceties of the logic of Aristotle or Emmanuel Kant, it is at least reasonably certain that in order to secure priority as against a tax lien of the United States, the adverse claimant for the property involved in this case, the plaintiff, Hawkins, must fairly and reasonably be embraced within one of the four classes whose rights are preserved by Section 3672, namely, as a mortgagee, a pledgee, a purchaser or a judgement creditor. In all of this, it is to be remembered that the notice of the Government lien was not filed in the local recording office until after the attachment was made by the plaintiff.

Obviously, the plaintiff is not a mortgagee, or a pledgee, or a judgement creditor, because the plaintiff's judgement could not possibly have been entered until after the Government filed its notice of lien as required by Sec. 3672; and so the plaintiff cannot prevail in this action unless under the law, she was a "purchaser" of the property before the Government's lien was filed for record on June 13, 1950. This leads us to the nature of attachment under the laws of Alaska.

The statutes of Alaska concerning attachments are to be found in Article 4, Sections 55-6-51 to and including Section 65-6-71 of ACLA, but the sections which have immediate and intimate bearing on the question involved are Sections 55-6-61 and Section 55-6-67 of ACLA. The first section reads as follows:

"Sec. 55-6-61. Cases in which plaintiff may attach: Time. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this article provided, in the following cases:

First. In an action upon a contract, express or implied, for the direct payment of money, and which is not secured by mortgage, lien, or pledge upon real or personal property, or, if so secured, when such security is insufficient to satisfy a judgment for the amount justly due the plaintiff.

Second. In an action upon a contract, express or implied, against a defendant not residing in the Territory."

Section 55-6-67 is quoted below:

"Sec. 55-6-67. Plaintiff's rights against third persons: Liability of persons failing to transfer property to marshal. From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next sec-

tion as to real property. Any person, association, or corporation mentioned in subdivision three of the section last preceding, from the service of a copy of the writ and notice as therein provided, shall, unless such property, or debts be delivered, transferred, or paid to the marshal, be liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied."

The sections above quoted are a part of the Act of Congress of June 6, 1900, an act making further provisions for the civil Government of Alaska. They are in no sense enactments of the Territorial Legislature, and, therefore, this case distinguishes itself from cases like those cited by counsel in which the Federal Courts are under the duty of construing as Federal questions the prior construction which may have been given by State Courts to statutes with respect to attachments and other claims for security operating counter to the interest of the United States in collecting its taxes under the laws of the United States. While in such cases it may be considered that the Congress of the United States in passing our existing laws concerning attachments acted as a territorial legislature, we must yet remember that our attachment statute is part of an Act of the United States Congress even though of local application only. Now, the Congress of the United States has said in Section 55-6-67 that "from the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith or for a valuable consideration of the property, real or

personal, attached * * * *". (Emphasis supplied.) Therefore, we find that under our laws so enacted by Congress, the plaintiff who attaches is and must be considered by the Courts as a purchaser in good faith and for a valuable consideration of the property attached. Hence, it seems plain that the plaintiff in this case brings herself clearly within the provisions of Section 3672 as a purchaser of the property. She is not a lien holder, she is not to be thought of as having inchoate right, but she is a purchaser, and not only a purchaser, but a purchaser in good faith and for a valuable consideration. No language could be more precise and none could be more emphatic for the support of the plaintiff's rights.

In this connection, it is deserving of note that the provisions of our procedural code with respect to attachments, like most of the other matter contained in the act of June 6, 1900, was adopted verbatim from the laws of Oregon. Section 55-6-67 ACLA 1949 is to be found in 1 Hill's Oregon Laws, Section 150, and is carried forward into the current laws of Oregon, 1 Oregon Compiled Laws Annotated, Sec. 7-207, the wording of which is identical with that of our statute.

The Supreme Court of Oregon has uniformly held that under the provisions of the attachment law mentioned, an attaching creditor is given the same position as that of a purchaser. The following are examples of the cases on the subject: Jennings v. Lentz, 93 P. 327 (1908); Security Savings & Trust Co. v. Locwenberg, 62 P. 647 (Ore., 1900). More im-

portant still, the rule was well established in Oregon before the passage of the Act of June 6, 1900. Boehreinger v. Creighton, 10 Ore. 42 (1881); Riddle v. Miller, 23 P. 807 (1890); Rhodes v. McGarry, 23 P. 971 (1890); Meier v. Hess, 32 P. 755 (1893). It is at least to be presumed that when our attachment statute was thus adopted from the laws of Oregon it was so adopted with the construction which had theretofore been placed upon it by the Supreme Court of that State, a construction which has never been departed from by that Court so far as known.

The plaintiff in this action under the law is a purchaser of the money attached against "third-persons" and those third persons in the absence of legislation cannot fail to embrace the United States. Accordingly, plaintiff's claim as to the property attached is entitled to priority of payment and the tax lien of the United States is subordinate thereto.

Plaintiff may have judgment against the defendant for the sum of $2,341.87, and the attachment made of that sum in the hands of J. B. Warrack Co., garnishee, shall be paid to the plaintiff in satisfaction of the judgment.

The lien of the United States, intervenor, on the funds so attached is subject and subordinate to the attachment lien of the plaintiff and to the judgment which may be rendered herein, and the attached money shall be paid to the plaintiff upon the judgment so rendered herein free and clear of all liens of the intervenor thereon.

The intervenor may not have judgment in this action against the defendant for the amount of its

tax lien. No personal judgment may be rendered herein in favor of the intervenor and against the defendant for the reason that no personal service of the summons issued upon the complaint in intervention, or of the summons issued upon the original complaint, in this action was made upon the defendant within the Territory of Alaska and hence recovery must be confined to the property attached and thus brought within the jurisdiction of the Court; and all of the attached property under the judgment rendered herein in favor of the plaintiff shall be applied in payment of that judgment. Pennoyer v. Neff, 95 U. S. 714 (1877).

Dated at Anchorage, Alaska, this 9th day of March, 1953.

/s/ ANTHONY J. DIMOND,
District Judge

[Endorsed]: Filed March 9, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

United States of America
Territory of Alaska—ss:

Bailey E. Bell, being first duly sworn, upon oath deposes and states as follows, to wit:

That on the 24th day of January, 1951, he placed a copy of the Complaint, a copy of the Affidavit of Attachment, and a copy of the Summons, issued in

the above entitled Court, dated the 22nd day of January, 1951, together with a copy of the Anchorage Daily News, a newspaper of general circulation in Anchorage, Alaska, in an envelope duly addressed to Lawrence Savage, d/b/a Lee Savage Painting Company, and placed proper postage thereon, and deposited it in the United States Mail, which envelope was addressed to Oakland, California, that being the last known address of the Defendant, Lawrence Savage, d/b/a Lee Savage Painting Company.

Further affiant sayeth not.

/s/ BAILEY E. BELL

Subscribed and sworn to before me, this 19th day of March, 1953, at Anchorage, Alaska.

[Seal] /s/ WILLIAM H. SANDERS,
Notary Public in and for Alaska. My Commission expires: 5-22-54.

[Endorsed]: Filed March 19, 1952.

[Title of District Court and Cause.]

ORDER AMENDING OPINION

It now appearing that inadvertent errors were made in the opinion in the above entitled action dated March 9, 1953, and filed herein on the same date, in order to correct said errors it is hereby

Ordered that the dollar sign and figures appear-

ing on page 1 of the opinion near the middle of the page, "$2,341.97" be stricken and that the following be inserted in lieu thereof "$2,341.87", and it is further

Ordered that the dollar sign and figures appearing on page 2 of the opinion in the second line of paragraph in middle of page, "$3,284.86" be stricken and that in lieu thereof the following be inserted: "$2,341.87", and it is further

Ordered that the Clerk of the Court amend the original opinion in conformity with this Order.

Dated at Anchorage, Alaska, this 19th day of March, 1953.

/s/ ANTHONY J. DIMOND,
District Judge

[Endorsed]: Filed March 19, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

Continuing Time to File Objections to Findings of Fact and Conclusions of Law and Judgment.

Now at this time upon motion of Arthur David Talbot, Assistant United States Attorney, for and in behalf of intervenor United States of America, in cause No. A-6011, entitled Jewel Hawkins, Plaintiff, versus Lawrence Savage, d/b/a Lee Savage Painting Company, Defendant, United States of America, Intervenor,

It is Ordered that Intervenor, United States of America be given one week within which to file objections to Findings of Fact and Conclusions of Law and Judgment.

Entered in Journal March 27, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter, coming on to be heard on the 17th day of September, 1952; the plaintiff appeared by Bailey E. Bell, her attorney; the defendant, Lawrence Savage, d/b/a Lee Savage Painting Company, did not appear; and the Court, having examined the service, finds that he was duly served and has heretofore been adjudged to be in default on the plaintiff's Complaint and Amended Complaint, as shown by the proof of publication in the files of this case. The intervenor, United States of America, appeared by Seaborn J. Buckalew, United States Attorney, at Anchorage, Alaska, and Thomas R. Winter, Civil Advisory Counsel, Bureau of Internal Revenue, Seattle, Washington. All parties announced ready for trial and introduced their evidence, and after the evidence was introduced, arguments were had and the case was taken under advisement by the Court, and both the plaintiff and defendant were given permission and directed to file briefs, which have been duly filed.

Thereafter, and on the 9th day of March, 1953,

the Court filed in said cause its written opinion finding in favor of the plaintiff, Jewel Hawkins, and directed the preparation, serving and presenting of Findings of Fact, Conclusions of Law and Decree, and from the pleadings, the evidence, arguments and briefs, the Court makes the following its Findings of Fact:

Findings of Fact

I.

That the plaintiff commenced this action against the defendant on the 27th day of February, 1950, for the recovery of $2,341.87, plus cost and attorney's fees, and caused an attachment to issue on that date.

II.

Thereafter, and on April 19, 1952, the writ of attachment was duly served on J. B. Warrack Co., who answered holding $2,341.87 due the defendant, Lawrence Savage.

III.

The plaintiff introduced in evidence fourteen checks drawn by defendant, presented to the bank on which they were drawn for payment, and payment was refused by reason of insufficient funds in the bank to pay said checks, the total of said fourteen checks amounting to $3,120.38.

IV.

The intervenor, United States of America, introduced all of its exhibits referred to in the Complaint of Intervenor, and rested.

V.

The Court further finds that the plaintiff is entitled to recover against the defendant, Lawrence Savage, d/b/a Lee Savage Painting Company, only insofar as there is money attached in the hands of J. B. Warrack Co., which amount equals at least $2,341.87, as shown by the return of attachment filed herein, but is not entitled to recover, and the decree rendered herein is not intended to be a personal judgment, but only insofar as funds are attached in possession of J. B. Warrack Co. for the payment thereof.

VI.

The Court further finds that the intervenor, United States of America, is entitled to no judgment in this action at this time, and the cause will be continued as to said intervenor.

* * * * *

VIII.

That the attachment in this action, raised, issued and caused to be served by the plaintiff attaching certain funds in the hands of J. B. Warrack Company, is hereby sustained and affirmed, and the plaintiff is entitled to a judgment of this Court requiring the garnishee, J. B. Warrack Company, to pay said money, $2,341.87, to the plaintiff or her attorneys.

IX.

Further finds that when J. B. Warrack Co. pays said sum to the plaintiff or her attorneys of record, and takes a receipt therefor, that the said J. B.

Warrack Co. is fully and completely released from any liability to the plaintiff in this action.

And from such Findings of Fact, the Court makes the following its Conclusions of Law:

Conclusions of Law

I.

That the plaintiff is entitled to a judgment on her Complaint for $2,341.87 and costs of this action in the sum of $....., but the total amount of the defendant's liability under such judgment shall not exceed $2,341.87.

II.

That the plaintiff's attachment be sustained and that J. B. Warrack Co. pay to plaintiff, or her attorneys, for the use and benefit of the plaintiff, said sum of money, $2,341.87.

III.

That the United States of America, intervenor, is not entitled to judgment for any sum in this case at this time and said cause may be continued as to said intervenor.

IV.

That judgment be rendered in this case in conformity with the opinion filed herein, the Findings of Fact and Conclusions of Law, which judgment is not in personam but only to the extent that funds have been attached in the hands of J. B. Warrack Co,. to-wit, $2,341.87.

Dated at Anchorage, Alaska, this 8th day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed April 8, 1953.

In The District Court for the Territory of Alaska, Third Division

No. A-6011

JEWEL HAWKINS, Plaintiff,

vs.

LAWRENCE SAVAGE, d/b/a LEE SAVAGE PAINTING COMPANY,

Defendant,

UNITED STATES OF AMERICA,

Intervenor.

JUDGMENT FOR PLAINTIFF

This matter coming on to be heard as shown by the records and files in this cause on the 17th day of September, 1952, plaintiff appeared by her attorney, Bailey E. Bell, the defendant appeared not, although duly served with Summons by publication, as by law required, and the Intervenor, United States of America, appeared by Seaborn J. Buckalew and Thomas R. Winger; all parties announced ready for trial; the plaintiff introduced fourteen

checks of which she was the owner, which checks had been drawn by the defendant, Lawrence Savage, d/b/a Lee Savage Painting Company, had been duly presented to the bank on which they were drawn and payment had been refused by reason that there were no funds to pay said checks in said account, and that she proved to be the owner and holder thereof; and the total sum of said checks amounted to $3,120.38.

It is further decreed that the following checks which were introduced as exhibits be returned to plaintiff's attorney, to-wit: (a) the check dated the 20th day of August, 1949, issued to John Widener, for the sum of $600.00; (b) the check dated August 20, 1949, issued to Frank Lancaster, in the sum of $60.00; (c) the check dated August 24, 1949, to John Donnell, in the sum of $31.01; (d) the check dated August 12, 1949, to Donald Purnell, for the sum of $87.50; for the reason that they are not sued on in the Complaint and this action in no way affects said checks, the same having been introduced through inadvertence and by mistake.

The intervenor, United States of America, introduced its evidence and all parties rested, and after argument the case was taken under advisement by the Court and a decision reserved. Both parties were directed to file briefs, which briefs were filed, and after full and complete consideration of the pleadings, the evidence, and the briefs, the Court filed its written opinion on the 9th day of March, 1953, in the above entitled cause.

Now, therefore, Findings of Fact and Conclusions of Law having been prepared, served, submitted,

and signed, and the Court being fully advised in the matter, finds the issues in favor of the plaintiff and against the defendant and against the intervenor, United States of America; that the plaintiff is entitled to and is hereby given a decree in said cause of action for $2,341.87, together with interest thereon at the rate of 6% per annum from the time of the filing of this action, to-wit: February 27, 1950, together with all costs but the total liability of defendant to plaintiff hereunder shall be $2,341.87, and no more.

It is further considered, ordered and adjudged that no personal judgment shall be rendered against Lawrence Savage, d/b/a Lee Savage Painting Company, but that the plaintiff may have judgment in rem against the funds held by J. B. Warrack Co. for the sum of $2,341.87, with interest and costs of this action, as above stated.

It is further considered, ordered, adjudged and decreed that the attachment raised, issued and served in the above entitled cause on behalf of the plaintiff, Jewel Hawkins, be, and the same is hereby affirmed and sustained in its entirety, and that J. B. Warrack Co. be, and it is hereby ordered, to pay to the plaintiff or her attorneys of record, Bell & Sanders, the sum of money held by them for plaintiff herein, in the sum of $2,341.87.

It is further adjudged and decreed that when the said J. B. Warrack Co. pays said sum of $2,341.87 to the plaintiff or to her attorneys of record, Bell & Sanders, and takes a receipt therefor, and that from then on the said J. B. Warrack Co. is forever re-

leased from any liability to the plaintiff in this action.

It is further adjudged and decreed that this cause shall be continued and further proceedings taken and judgment and decree made with respect to the claims of the Intervenor against the defendant herein.

Dated at Anchorage, Alaska, this 8th day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed April 8, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, intervenor above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 8, 1953.

/s/ ARTHUR D. TALBOT,
Assistant United States Attorney, Third Judicial Division, Territory of Alaska, Attorney for Intervenor United States of America.

[Endorsed]: Filed April 14, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Bell & Sanders, Central Building, Anchorage, Alaska.

Sirs:

Please take notice that on April 20, 1953, at 10:00 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard the undersigned will move this Honorable Court for an order, pursuant to Rule 62 of the Federal Rules of Civil Procedure, staying the execution of or any proceedings to enforce the judgment herein, entered on April 8, 1953, pending the appeal herein by intervenor United States of America, on the ground that United States will be prejudiced if plaintiff is granted execution on the judgment herein before the determination of the appeal.

/s/ ARTHUR D. TALBOT,
Assistant United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed April 14, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR STAY OF EXECUTION

Now at this time Hearing on Motion for Stay of Execution in cause No. A-6011, entitled Jewel Hawkins, plaintiff, United States of America, Inter-

venor, versus Lawrence Savage, d/b/a Lee Savage Painting Company, defendant came on regularly before the Court, Arthur David Talbot, Assistant United States Attorney, present for and in behalf of the Government, Bailey E. Bell, appearing for and in behalf of the Plaintiff, the following proceedings were had, to-wit:

Argument to the Court was had by Arthur David Talbot, Assistant United States Attorney, for and in behalf of the Government.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the Plaintiff.

Whereupon, the Court granted Motion for Stay of Execution.

Entered in Journal April 20, 1953.

[Title of District Court and Cause.]

ORDER

The United States of America, having moved the Court for an order, pursuant to Rule 62 of the Federal Rules of Civil Procedure, staying the execution of or any proceedings to enforce plaintiff's judgment herein, entered on April 8, 1953, pending the appeal of Intervenor United States of America, and argument having been had thereon on April 20, 1953, Arthur D. Talbot, Assistant United States Attorney, having been heard in support of said motion, and Bailey E. Bell, of Bell and Sanders, attorneys for plaintiff, having been heard in opposi-

tion thereto, and due deliberation having been had thereon, it is hereby

Ordered that a stay of execution of or any proceedings to enforce plaintiff's judgment herein, entered on April 8, 1953, be and the same is hereby granted pending the appeal of Intervenor United States of America, until such time as the appeal has been abandoned or determined, and it is further

Ordered that the garnishee, J. B. Warrack Company, pay into the Registry of the Court $3,284.86, said sum representing the total indebtedness of J. B. Warrack Company to the defendant herein, as admitted by J. B. Warrack Company in its return on the notice of tax levy served upon J. B. Warrack Company by the United States Collector of Internal Revenue on June 12, 1950, and it is further

Ordered that upon payment of $3,284.86 into the Registry of the Court the said garnishee, J. B. Warrack Company, shall be discharged of any further liability in respect of this action.

Dated at Anchorage, Alaska, this 21st day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed April 21, 1953.

[Title of District Court and Cause.]

ORDER

On the ex-parte application of Intervenor, United States of America, the Court being fully advised, it is

Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by intervenor by notice of appeal filed on the 14th day of April, 1953, is extended to July 1, 1953, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure.

Done at Anchorage, Alaska, this 18th day of May, 1953.

/s/ ANTHONY J. DIMOND,
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed May 18, 1953.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

In the captioned case the Intervenor designates the entire record as the record on appeal, including

all pleadings, all exhibits, and the transcript of the proceedings.

SEABORN J. BUCKALEW,
United States Attorney.
/s/ ARTHUR D. TALBOT,
Assistant U. S. Attorney.

Acknowledgment of Service attached.

[Endorsed]: Filed June 16, 1953.

In the District Court for the District of Alaska
Third Division

No. A-6011

JEWEL HAWKINS, Plaintiff,

vs.

LAWRENCE SAVAGE, doing business as Lee Savage Painting Company,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Anchorage, Alaska, September 17, 1952

Before Honorable Anthony J. Dimond, United States District Judge.

Mr. Bailey E. Bell, Attorney for Plaintiff.
Mr. Thomas R. Winter, Attorney for Intervenor.
Mary Keeney, Court Reporter. [1*]

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

On Wednesday, September 17, 1952, the above-entitled matter came on regularly for trial in open court at Anchorage, Alaska, before The Honorable Anthony J. Dimond, United States District Judge.

The plaintiff was represented by Bailey E. Bell, Attorney-at-Law.

The Intervenor was represented by Thomas R. Winter, Attorney-at-Law.

At that time the following proceedings were had:

Court: This is the time set for trial of cause No. A-6011, Jewel Hawkins, Plaintiff, vs. Lawrence Savage, d/b/a Savage Painting Company, Defendant, United States of America, Intervenor. I have read all of the papers in the case and I will be pleased to have counsel make opening statements.

Mr. Bell: Your Honor, mine will be very brief. My complaint [3] practically states all of my contention. The plaintiff, Jewel Hawkins, is the owner of a large number of checks that were cashed with her and which were turned down, NSF, at the Bank. These are payroll checks, labor checks, and dated, all of them, in 1949, and most of them in August of 1949, and the one for $2,000.00, that was endorsed and cashed at the Northern Commercial Company, was paid by Jewel Hawkins and signed to her, because she had endorsed, and I have set them out in separate causes of action for the convenience of the Court, and that the objections might be made to them separately. My contention is this, and the argument will base on this—the action was filed—you have the date there before you——

Court: February 27, 1950, apparently.

Mr. Bell: Yes; February 22, 1950.

Court: 27th.

Mr. Bell: 27th, and attachment was issued and served on J. B. Warrack & Company, and J. B. Warrack & Company answered back, holding certain sums sufficient to satisfy invoice due the defendant, and did not state as to the remainder of funds they had in their possession, and which I understand have later been paid to the Savage Company, or to the persons entitled to claim it, by this company. The evidence will show in this case that at a later date there was a motion and application to intervene by the United States Government, which was opposed by me but Your Honor permitted them to intervene and the intervening [4] petition was filed. In that it was claimed they had a prior lien on those garnisheed funds, or attached funds, and we answered that they did not have a prior lien, that we had the prior lien since it was personal property and not real estate, and that the filing of the Notice Lien was not sufficient. That question will probably be one of the questions that will come up before you. Now, I understand that Mr. Winter tells me he's got an exact copy of the one that was filed before Rose Walsh, and if Mr. Winter tells us that is an exact copy, I will take his word for it—I won't require to have him certify it. My position will be all the way through that my lien is prior. Now, I understand the record will show, and I didn't check it, but you signed the Order of Default for the Government and for me, is that right?

Court: I think only against the Lawrence Savage Company; the defendant was declared in default—that is my recollection of it.

Mr. Bell: I think we both had about the same——

Court: The Government moved for default against the plaintiff because the plaintiff failed to respond to the complaint in intervention, but that motion was denied and the plaintiff thereafter filed an answer to the complaint in intervention, and there is an order of default which was signed on June 6th on behalf of the plaintiff against the defendant Lawrence Savage. Lawrence Savage was served and did not appear, and the default [5] was entered against Lawrence Savage.

Mr. Bell: Now, I take it there has been nothing done by the Court to establish priority between we people in any way?

Mr. Winter: That's right.

Court: No, nothing has been done by the Court as to the relative priority.

Mr. Bell: That's right, and that will possibly be the big tussle here.

Court: Counsel said something as to the claims being embraced in the complaint being payroll claims for labor performed.

Mr. Bell: The checks show that, Your Honor.

Court: What about the $2,000.00 item; is that a payroll claim?

Mr. Bell: Let me see, Your Honor.

Mr. Winter: It was a check for a gambling loss, wasn't it?

Mr. Bell: No, there wasn't anything of it that could be insinuating that.

Mr. Winter: Of course, I don't think that makes any difference, Your Honor.

Mr. Bell: That's not it at all, and we had Mrs. Hawkins here to testify and she went way off in the Arctic to operate a roadhouse where the Government is building an airfield, and I, of course, couldn't get her for this.

Court: Is she in the city now?

Mr. Bell: No; I told her since Mr. Cooper and I talked [6] this over, our contention has been over priorities.

Mr. Winter: Was there a $2,000.00 check there—that's the only one I was thinking of that was for a gambling loss.

Mr. Bell: There is no pleading to that effect. It's a check—just a payroll check like the rest of them. The Northern Commercial Company cashed it for Mrs. Hawkins and she had to pay it, so we allege in the complaint that she verified. She cashed it and needed money so she went to the Northern Commercial Company and they cashed it for her and I believe put it through, and she had to redeem it when it came back, and she paid it out, and there is no contention anywhere in the pleadings of either party that there was any gambling debt. They were painting the bridge at Nenana and there was no bank there and the plaintiff was running a roadhouse there at Nenana, and a bar, and they were acting as a bank in that vicinity there, and these checks were cashed there and they have the names

of the individuals who they were issued to on the check and endorsed by that particular individual. My client's contention is that the $2,000.00 check was an accumulation of some checks there and some money that the foreman wanted to pay the men on the job, and he came there and issued a $2,000.00 check to her and she cashed it for him—that was Lawrence Savage himself—and she cashed it for him and he used cash to pay the men there at her place that evening. That question isn't raised, but since he mentioned gambling, I thought we better clear that up in your [7] mind, because we don't want to go in with any strikes against us.

Mr. Winter: Have you had default judgment entered against Savage?

Mr. Bell: Yes.

Mr. Winter: I take it default judgment has been entered against Savage.

Court: It may be entered. The checks ought to be entered in evidence.

Mr. Winter: If the Court please, this case involves a very simple question of law, in my opinion. Lawrence Savage, the defendant, became indebted to the United States for withholding and Social Security taxes, Federal Insurance Contribution Taxes, for the quarter ended 9/30/49—that is, September 30, 1949, for taxes which exceed, now exceed $3,381.26; that is the basic amount that is due, without interest, on those taxes. In other words, Mr. Savage incurred tax liability to that extent prior to September 30, 1949. On December 27, 1949, the assessment list was received by the Collector

of Internal Revenue; in other words, it is our position that on December 27, 1949, the United States, under Section 3670, which so provides, acquired a lien against all of the property of Lawrence J. Savage; that is what the statute provides, that the United States shall have lien against property after the assessment list is received—after Notice and demand for the payment of the taxes. Notices of Tax Liens covering the assessment of the taxes were filed with [8] the United States Commissioner on June 28, 1950, and the 13th day of June, 1950, and I have copies of those Notices of Tax Liens. Now, if Your Honor will get those dates. In other words, assessment list was received on December 27, 1949, and Notice of Tax Lien was filed, the first one on June 13th—we will just use the second date—June 28, 1950.

Court: The United States Commissioner at Valdez, is that right?

Mr. Winter: At Anchorage. On February 27, 1950, after we had a lien against the taxpayer Savage, and all of his property and rights to property, the plaintiff, Mrs. Jewel Hawkins, brings this suit. On April 19, 1950, after we had our lien, they filed an attachment against J. B. Warrack Company. J. B. Warrack Company owes Savage $3,284.86. Now, that's what we are fighting here over. The amount that J. B. Warrack has belonging to Savage is $3,284.86. Now, we have levied against that fund in the hands of Warrack, and the plaintiff has attached it. Now the plaintiff does not have a judgment as of yet. We filed our Notice of Tax

Liens in June of 1950, but here it is 1952 and they don't have a judgment yet. In other words, they haven't perfected their judgment lien even yet, and it is our position, and there is a decision of the Supreme Court of the United States which is even stronger—in that case we hadn't received our assessment list prior to the time they attached the property attachment on the bank account. [9]

Court: Let's stick to the facts, now.

Mr. Winter: I'm showing there is a difference. The question is—it is our position that the United States, having acquired its tax lien by having received the Assessment List and having filed Notice of Tax Lien prior to the time plaintiff obtained a judgment, and our assessment even preceding the time they even attached, that we have a prior lien to the attachment lien, and there are no cases to the contrary, so far as I know, in decisions on that question of law.

Mr. Bell: Your Honor, at this time I would like to offer in evidence all of the checks, and ask that they be marked as one exhibit for the convenience of the Court.

Court: They may be admitted and marked Plaintiff's Exhibit 1.

Mr. Bell: And we ask judgment on the checks as against Savage, and Your Honor, I could——

Court: Default judgment may be entered.

Mr. Winter: We will offer, if the Court please—I have copies of Notices of Tax Liens showing dates on the back, which were filed with the United States Commissioner at Anchorage, June 28, 1950, at 3:00

p.m., with Rose Walsh, and on June 13, 1950, at 11:00 a.m., with Rose Walsh.

Mr. Bell: We do not object to them on the theory that they are not certified; we have implicit confidence in counsel; he states they are copies. I do object to them on the grounds they [10] are not sufficient to create any lien of any kind; they are not verified or sworn to as by law required, and not filed in the proper place, is two reasons why I object to them, and the third reason is that no proceedings were based upon them afterwards, therefore the liens would not be admissible.

Court: In order to dispose of the trial now, it is necessary not to inquire into the verification of points of law made by counsel in his objections. Therefore, the objections will be overruled and the papers will be admitted in evidence without ruling upon the questions of law involved.

Mr. Bell: All right.

Mr. Winter: We would also like to offer in evidence a certified copy—it is Form 899—it is a certified copy by the Collector of Internal Revenue of the official records in his office and it is admissible under the Rules and under the United States Code, without any further evidence whatsoever, being a certified copy of official Government records in the possession of an official in the Executive Branch of the Government.

Mr. Bell: I object on the grounds that a certified copy is insufficient within the law and within the statute, and that it is not admissible in an action of this kind.

Court: The objection is overruled without passing finally upon the questions of law involved. It may be admitted in evidence, marked Intervenor's Exhibit C, and the others will be A and B. [11]

Clerk: They are attached, Your Honor; I have marked them as one.

Court: Does counsel for the United States wish the first two papers to go in as one exhibit?

Mr. Winter: I think they might as well, Your Honor.

Court: Very well; Exhibit A, then, and the certified copy from the Collector of Internal Revenue is Exhibit B.

Mr. Winter: Your Honor, I thought I had a copy of our Notices of Levies served on J. B. Warrack Company, but I have asked Mr. Collar to get it, and with the exception of having Mr. Collar testify that he served Notice of Lien in accordance with 3671, that will be all of our testimony.

Mr. Bell: I want to introduce as part of my case in chief, the attachment affidavit and the attachment undertaking, and the writ of attachment and the return, and make them a part of my case in chief.

Mr. Winter: We have no objection.

Court: They may be admitted; I think they are all in the file except the undertaking—that is kept in a special file in the Clerk's office. I don't know whether it is necessary, but we will include that, too, in the papers introduced.

Mr. Winter: I might state to the Court that all I want to show is that Notice of Levy was served

on J. B. Warrack Construction Company * * * have they answered your attachment?

Mr. Bell: Oh, yes. [12]

Mr. Winter: And they are holding $3,284.86 under the Levy served by the United States, and also under the attachment, and that is the question for the Court to determine. It is our position that the Levy by the United States does not affect one way or the other the priority rights of the United States, although they are our means of enforcing our lien, and the Courts have so held.

Court: Against Warrack?

Mr. Winter: That's right, Your Honor. Now, I am ready to argue, and we will just put that evidence in; he will be right back. I have a typewritten copy of the case which we rely upon entirely, and I would like to hand it to the Court. The Supreme Court of the United States; I think this case is determinate of the issue without any further authority.

Court: All of the papers concerning the attachment, and returns to the attachment, are admitted in evidence. They may go in as one exhibit.

Mr. Winter: If the Court please, I have three documents, three Levies on Form 668A—they are the official records of the Collector of Internal Revenue, or notice of levies, which were served on J. B. Warrack Company on June 12, 1950, at 2:50 o'clock a.m., as shown by the receipt of Warrack; on June 30, 1950, at 3:50 o'clock a.m., and April 20, 1952, at 8:21 o'clock a.m., served on Ellie Scott for J. B. Warrack Company. I would like to in-

troduce these original documents and substitute copies, because they are official records of the Collector of Internal Revenue, and we would like to substitute typed copies.

Mr. Bell: Your Honor, I am not objecting to him having the right to introduce, that is, to substitute copies on account of them being his record, I have no objection on that ground, but I do object to the introduction of them for the reason they are incompetent, irrelevant and immaterial and not sufficient for creating any lien—that the notices are not sufficient to create a lien as of themself. I am not objecting to the fact they are not properly identified. I admit, for the sake of the record, that they are the original, of which copies must have been served on J. B. Warrack Company, because they are certified that they were served by Mr. Klein, and I am sure he wouldn't have said they were unless they were, but I do object to their introduction for the reason they are insufficient under the laws.

Mr. Winter: If the Court please, we do not contend that they in any way add to our lien; in other words, our levy is our usual procedure, which is only our means of enforcing our already existing lien. It is merely to show that we attempted to collect from J. B. Warrack Company, and that is the reason we have intervened in this case, is because of the attachment. We have to have this Court release this attachment because we have prior lien upon the property. Our lien is already perfected by filing of the Notice, but I think it is relevant to show the true picture to the Court and I don't

think it can hurt counsel's [14] position one way or the other.

Court: Yes; I think it does not affect the position of the plaintiff, and the objection will be overruled and the papers admitted. Do you wish to have them go in as one exhibit?

Mr. Bell: Object to their going in as one exhibit, because my objections will go to each exhibit.

Court: All right; Exhibits D, E, and F.

Mr. Bell: And may my objection go to each one?

Court: Oh, yes; I am not passing upon the question of law. I want all the papers before me.

Mr. Winter: May we substitute certified copies?

Court: Oh, yes; the Collector may furnish the forms to the Clerk and also type on "Certified by the Clerk that this is a certified copy". I suppose that completes the evidence.

Mr. Winter: That is the Government's case.

Court: Counsel for Intervenor said, "a very simple question of law." It may be simple to counsel, but it is not so simple for the Court. I would be glad to hear what counsel have to say; if counsel want to prepare written briefs——

Mr. Bell: I was going to suggest that, and I am sure Mr. Winter has the situation in hand.

Mr. Winter: I have already filed mine. If you can show me a case that overrules the Supreme Court of the United States——

Mr. Bell: I will show you that's real estate——

Court: Counsel has the citation? [15]

Mr. Bell: I know what case; I suppose it's 340 U.S. at 47——

Mr. Winter: It's United States vs. Security Trust and Savings Bank of San Diego; it involves attachment against personal property in the Bank of San Diego; it doesn't involve real estate at all.

Mr. Bell: Is that 340 U.S., at 47?

Mr. Winter: That's right. Your Honor can put that citation on the top of it. That involved an attachment against a bank account in the Security Trust and Savings Bank in San Diego by an attaching creditor, such as here.

Mr. Bell: I may be mistaken, then; I'm sure Mr. Winter wouldn't misstate a fact, but Your Honor, there is a very important case, and I thought that's the one he was citing, on real estate, where the lien was filed on real estate and the real estate was later sold to an innocent person who did not have notice of the filing of the lien, and the Courts held that filing of the lien was notice. That is a strong case. I can't remember the citation. Would Your Honor indicate how much time I could have to file my brief?

Court: Anything within reason, counselor.

Mr. Bell: Would 15 days be all right?

Court: 15 days will be all right, and Mr. Winter may have 10 days after service of the brief to file his answer, if he wishes.

Mr. Winter: I wonder if I might have 15 days, because of [16] the uncertainty of the mails.

Court: 15 days, then.

Mr. Winter: Your Honor, I would like to have Your Honor refer to one other Ninth Circuit Court of Appeals decision, if Your Honor will write on

that; that is, MacKenzie vs. United States, at 109 Federal, 2nd, page 540; that is a Ninth Circuit Court of Appeals decision.

Court: Have you any other cases to cite?

Mr. Winter: Well, the Supreme Court decision is so analogous because it involved exactly the same situation—an attachment on a bank account, or a debt. The MacKenzie case, Your Honor, is a case involving also a question of whether or not the lien of the United States attached to intangibles such as debt or bank account, such as we have here. That was the first case they decided that the lien of the United States did attach to intangibles, then the Supreme Court came along in the Taft case and says not only does a lien of the United States attach to intangibles, but it attaches to after acquired property.

Court: May I have the Taft citation?

Mr. Winter: Yes; United States vs. Taft, 44 Federal Supplement at 565, which was affirmed by the Circuit Court of Appeals of the Ninth Circuit in 135 Federal, 2nd, at 527, but the case I have in mind is the Glass City Bank of Jeanette vs. The United States, in 326 U.S. 265.

Court: Very well; I have Taft, Glass City Bank, MacKenzie, [17] and a copy of the opinion in the Security Trust case.

Mr. Winter: I think those cases—I mean, the reason why I am giving Your Honor those other cases is because they go into—in the Long Island case, it was thought that the United States lien didn't attach to intangibles because of some dicta

in the Long Island Acts, but the United States Supreme Court came along and said that it attaches to a bank account, and the Supreme Court in the Taft and Glass City Bank cases came along and said not only does it attach to intangibles, but after notice of tax lien is filed, reaches out and attaches to any property taxpayer might acquire in the future. Our lien attaches not only to the property, but rights to property. This case is just like the Supreme Court decision exactly, except our assessment list had been received prior to the time of the attachment. We have a lien prior to their attachment by reason of receiving their assessment list. They were not a judgment creditor until Your Honor ordered the judgment today.

Court: My opinion is, offhand—I would be glad to hear counsel upon that—but the attachment is used the same in legal effect as the judgment.

Mr. Winter: The Supreme Court of the United States says the doctrine of relation back does not apply to the lien of the United States, the express words of the United States Supreme Court. The Supreme Court says that until the judgment creditor gets a judgment he has nothing more than an inchoate lien. If [18] Your Honor will read that decision—there is no authority to the contrary.

Court: I will read them, of course.

Mr. Bell: Your Honor, I don't care to argue——

Mr. Winter: But, Your Honor, even if Your Honor is correct, if it is the same as a judgment, they didn't get their judgment until April. We ac-

quired our lien by receiving the assessment list in December.

Court: That is reasonable, but to say that a judgment is of no more effect than counsel would indicate, is rather surprising. I would be glad to have counsel refer to that in his brief, and I will have that in writing before me.

Mr. Winter: There is only a short opinion there; I thought I had it. May I see that typewritten copy, Your Honor?

Court: Yes.

Mr. Winter: The Supreme Court says this, "The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years, or within such extension as the statute provides. Numerous contingencies might arise which would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a lis pendens notice that a right to perfect a lien exists. Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates [19] the judgment lien back to the date of attachment—operate to destroy the realities of the situation." In other words, it was after the attachment—which we did here—Morrison did not have a judgment lien; in other words, when our notice of tax liens were filed, Hawkins did not have a judgment lien. Under Section 3466, "It has never been held sufficient to defeat the federal priority merely to show

a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. Illinois vs. Campbell, Supra, 374. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment lien of Morrison, and the judgment of the District Court of Appeal for the Fourth Appellate District is reversed." In other words, although the judgment reverts back to the date of the judgment, if our lien is carried in the interim before a judgment, we have priority. Exactly the same situation we have here, except in that case we didn't then have the assessments before the attachment.

Court: I will be glad to have counsel devote some attention to that point.

Mr. Bell: Your Honor, California has a peculiar attachment statute and the Supreme Court of California, prior to the United States passing on this case, had construed that attachment differently from all other States; I will cite that in my brief. That case is a different situation from this one. I will get that to you as soon as I can.

Court: Counsel may do it at his own convenience, within the time prescribed.

Thereupon, at 11:50 o'clock a.m., September 17, 1952, trial of the above-entitled cause was concluded.

[Endorsed]: Filed May 25, 1953.

[Title of District Court and Cause.]

ORDER

On the ex-parte application of Intervenor, United States of America, the Court being fully advised, it is

Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by intervenor by notice of appeal filed on the 14th day of April, 1953, is extended to July 12, 1953, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Done at Anchorage, Alaska, this 16th day of June, 1953.

/s/ GEORGE W. FOLTA,
United States District Judge.

[Endorsed]: Filed June 16, 1953.

[Title of District Court and Cause.]

ORDER

On the sub-joined consent of Bailey E. Bell, Esquire, of attorneys for plaintiff Jewel Hawkins, and upon motion of Arthur D. Talbot, Assistant United States Attorney, attorney for intervenor United States of America, it is hereby

Ordered that the Clerk of the Court submit to the Clerk of the Circuit Court of Appeals for the

Ninth Circuit, the original papers and exhibits herein, in lieu of copies thereof.

Done at Anchorage, Alaska, this 18th day of June, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

I hereby consent to the entry of the foregoing Order without further notice.

/s/ BAILEY E. BELL,
Attorney for plaintiff Jewel Hawkins.

[Endorsed]: Filed June 18, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75(g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the complete record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on April 8, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: No. 13887. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jewel Hawkins, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: June 24, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13887

UNITED STATES OF AMERICA,

Appellant,

vs.

JEWEL HAWKINS, Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

1. The Court erred in concluding that since the plaintiff, as against third persons, is deemed to be a purchaser according to Article 4, Section 55-6-67, Alaska Compiled Laws Annotated, she is also a purchaser within the meaning of Section 3672, Internal Revenue Code.

2. The Court erred in concluding that the Alaska Statute is controlling in determining the definition of persons protected by the Federal Laws pertaining to the priority of tax liens.

3. The Court erred in concluding that the plaintiff's attachment lien secured prior to judgment has priority over tax liens of the United States recorded subsequent to the plaintiff's attachment but prior to judgment.

4. The Court erred in entering judgment for the plaintiff and ordering that the plaintiff's at-

tachment should be sustained and that her judgment should be satisfied out of the attached fund, free and clear of all liens of the United States.

/s/ SEABORN J. BUCKALEW,
United States Attorney.

/s/ ARTHUR D. TALBOT,
Assistant U. S. Attorney,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed July 1, 1953. Paul P. O'Brien, Clerk.

No. 13887

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JEWEL HAWKINS, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE UNITED STATES

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
EDWARD W. ROTHE,
Special Assistants to the Attorney General.

SEABORN J. BUCKALEW,
United States Attorney.

ARTHUR D. TALBOT,
Assistant United States Attorney.

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v.

JEWEL HAWKINS, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 57-71) below is reported at 110 F. Supp. 618; the Findings of Fact (R. 72-73) and Conclusions of Law (R. 74-78) are unreported.

JURISDICTION

This is an appeal by the United States from a judgment of the District Court in an action brought on February 27, 1950, by Jewel Hawkins against Lawrence Savage, doing business as Lee Savage Painting Company, as the holder of certain checks issued by Savage totaling $2,341.87 but dishonored by the drawee-bank for lack of sufficient funds. (R. 58.)

On April 19, 1950, Jewel Hawkins caused a writ of attachment to be served on J. B. Warrack Company, which acknowledged a debt of $2,341.87 to Lawrence Savage at that time. (R. 75.)

On September 21, 1950, the United States, having been granted leave to intervene, filed its petition of intervention seeking judgment against Lawrence Savage for unpaid taxes and asserting the priority of its tax lien over the attachment lien of Jewel Hawkins, with respect to the sum owing by J. B. Warrack Company to Lawrence Savage. (R. 33-37.)

On October 30, 1950, the court authorized service of summons upon Lawrence Savage by publication, upon a showing by Jewel Hawkins that Lawrence Savage could not be served with summons in the Territory of Alaska but did have personal property within the jurisdiction of the court. (R. 38-39.)

On June 6, 1952, upon motion of Jewel Hawkins, the court ordered default of Lawrence Savage for failure to answer the complaint. (R. 51.)

On September 17, 1952, the case was tried before the court without a jury and briefs were later filed. (R. 74.)

On March 9, 1953, the court filed a written opinion in favor of Jewel Hawkins and against the United States with respect to the issue of the priority of their respective liens as to the sum owed by J. B. Warrack Company to Lawrence Savage. (R. 70.)

On April 8, 1953, the court filed findings of fact and conclusions of law to the same effect as his opinion (R. 74-78) and rendered judgment awarding the $2,341.87 held by J. B. Warrack Company to Jewel Hawkins, discharging J. B. Warrack Company from all liability to Jewel Hawkins upon payment of that sum

to her or her attorney, and continuing the case as to the claims of the United States against Lawrence Savage. (R. 80-81.)

On April 14, 1953, the United States filed notice of appeal from the judgment of the District Court. (R. 81.)

On April 21, 1953, the court filed an order granting a stay of execution pending appeal and ordering J. B. Warrack Company to pay $3,284.86 into the registry of the court, since that amount represents the total debt to Lawrence Savage which J. B. Warrack Company acknowledged when served with a notice of tax levy on June 12, 1950. (R. 84.)

On May 18, 1953, the District Court extended the time for filing the record on appeal and for docketing the appeal to July 1, 1953 (R. 85) and on June 16, 1953, extended the time to July 12, 1953 (R. 104).

On June 16, 1953, the United States filed its designation of record on appeal. (R. 85-86.)

On July 1, 1953, the United States filed in this Court a statement of points upon which appellant intends to rely on appeal. (R. 107-108.)

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, c. 786, 31 Stat. 321, Section 4, as amended (48 U.S.C. 1946 ed., Sec. 931). This Court has jurisdiction to review a final decision of the District Court for the Territory of Alaska under the provisions of 28 U.S.C., Sections 1291 and 1294.

QUESTION PRESENTED

Did the District Court err in holding that Jewel Hawkins was a "purchaser" within the meaning of Section 3672 of the Internal Revenue Code, and was therefore entitled to priority over tax liens of the United States,

notices of which were filed subsequent to an attachment by Hawkins but prior to the date she secured judgment?

STATUTES INVOLVED

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1946 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASES, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by

the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3672.)

3 Alaska Compiled Laws Annotated (1949):

SEC. 55-6-67. *Plaintiff's rights against third persons: Liability of persons failing to transfer property to marshal.* From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property. Any person, association, or corporation mentioned in subdivision three of the section last preceding, from the service of a copy of the writ and notice as therein provided, shall, unless such property, or debts be delivered, transferred, or paid to the marshal, be liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied.

STATEMENT

The facts are not in dispute. The chronological sequence of events is as follows:

On December 27-28, 1949, the Collector of Internal Revenue received the Commissioner's assessment lists containing assessments of withholding and Federal Insurance Contributions Act taxes against Lawrence Savage for the taxable quarter ending September 30, 1949,

totaling $2,711.90, plus penalties and interest, and notified Savage of the assessments, and demanded payment. (R. 58.)

On February 27, 1950, Jewel Hawkins commenced an action against Lawrence Savage to recover $2,341.87 for which sum she had been held liable as indorser of certain checks drawn by Savage which had been dishonored by the bank for lack of sufficient funds, plus costs and attorneys' fees. (R. 58.)

On April 19, 1950, the writ of attachment was served on J. B. Warrack Company, which acknowledged that it owed Lawrence Savage $2,341.87 at that time. (R. 58.)

On June 12, 1950, the Collector of Internal Revenue served on J. B. Warrack Company a notice of levy for taxes in the principal sum of $2,969.05 (R. 58), at which time J. B. Warrack Company acknowledged that it owed Lawrence Savage a total of $3,284.86 (R. 84).

One June 13, 1950, a notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska. (R. 58.)

On June 22, 1950, the Collector of Internal Revenue received the second assessment list containing an assessment of withholding and Federal Insurance Contributions Act taxes against Lawrence Savage for the taxable period ending June 16, 1950, totaling $632.47, and notified Savage of the assessment, and demanded payment. (R. 58-59.)

On June 30, 1950, a second notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska, covering the second assessment. (R. 59.)

On June 6, 1952, Jewel Hawkins secured an order of default as to Lawrence Savage. (R. 51.)

The District Court held that Hawkins was obviously

not a mortgagee, pledgee or judgment creditor within the meaning of Section 3672 of the Internal Revenue Code, and therefore could not prevail unless she was a "purchaser" of the property before the Government's lien was filed for record on June 13, 1950. (R. 66.) It held, however, that under 3 Alaska Compiled Laws Annotated, Section 55-6-67, *supra,* a plaintiff who attached before judgment was given the status of a purchaser against third persons (R. 68-69); that "third persons" in the Alaskan statute includes the United States (R. 70); that Hawkins' attachment made her a purchaser within the meaning of Section 3672 of the Internal Revenue Code; and that as her attachment was secured prior to the time the Government's notices of liens were filed, she was entitled to priority.

STATEMENT OF POINTS TO BE URGED

A statement of points upon which the Government relies is set forth in the Record (pp. 107-108). It may be summarized as follows:

The court erred in concluding that Hawkins' attachment made her a purchaser within the meaning of Section 3672 of the Internal Revenue Code; and in concluding that she was entitled to priority over federal tax liens, notices of which were filed prior to judgment, though subsequent to Hawkins' attachment.

SUMMARY OF ARGUMENT

A federal tax lien attaches to all property or rights to property of the taxpayer upon the date the assessment list is received by the Collector. It is, though no notice thereof has been filed, valid against all persons other than those enumerated in Section 3672 of the Internal Revenue Code. Subsection (a) of that section is the

only portion thereof material to a decision of the instant case. It provides that a federal tax lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed in the manner therein prescribed. The purpose for which the section was enacted shows, and the decisions hold, that the terms "mortgagee", "pledgee", "purchaser", and "judgment creditor" are used in their conventional sense; and that one can not be brought within the terms of the statute merely because by legislative fiat or by local court decisions he is accorded the *status* of one of the excepted classes.

It is at least doubtful whether the Congress, which enacted both the Alaskan statute (in 1900) and Section 3672 (in 1913), had the power to accord special treatment to the claims of residents of Alaska by giving them priority where under the same circumstances claims of citizens residing elsewhere would be inferior to federal tax liens. But regardless of whether or not the Congress had such power, the purpose for which Section 3672 was enacted, disclosed by its history, clearly shows that the Congress did not intend that "purchaser" as used in the Alaskan statute be a "purchaser" within the meaning of Section 3672. On the contrary, the Congress intended that the latter section should be uniformly applied throughout the United States and its territories.

ARGUMENT

The Lien of the United States for Taxes Was Superior to Hawkins' Attachment Lien

The tax lien which arises in favor of the United States at the time the assessment list is received by the Collector covers all property or rights to property belonging to the delinquent taxpayer. Sections 3670 and 3671,

Internal Revenue Code, *supra; Glass City Bank* v. *United States,* 326 U.S. 265. In construing the predecessor of these sections the Supreme Court held that local recording statutes did not apply to federal tax liens; and that such a lien could be asserted even against a purchaser of the taxpayer's property, for value and without notice of the outstanding tax lien. *United States* v. *Snyder,* 149 U.S. 210.[1]

It was to correct this inequity that Congress in 1913 enacted the predecessor of Section 3672, Internal Revenue Code, *supra* (Revised Statutes, Section 3186, amended by the Act of March 4, 1913, c. 166, 37 Stat. 1016), which provided that a tax lien should not be valid as against mortgagees, purchasers or judgment creditors until filed for record in the manner prescribed. The provision was later amended (Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 401) to add pledgees to the protected classes (and in other respects immaterial here).

It is thus seen that prior to 1913 an unrecorded federal tax lien yielded priority to no one—not even to an innocent purchaser for value. See the decision of this Court in *MacKenzie* v. *United States,* 109 F. 2d 540. The doctrine of relation back—which by process of judicial reasoning merges the attachment lien into the judgment and relates the judgment lien back to the date of attachment—does not operate to destroy the realities of the situation. When the tax liens of the United States were recorded Hawkins did not have a judgment lien. She had a mere caveat of a more perfect lien to come. The doctrine of relation back does not apply

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[1] The same was true of the estate tax lien (*Detroit Bank* v. *United States,* 317 U.S. 329) until after the amendment found in Section 827, Internal Revenue Code.

against the United States. See *United States* v. *Security Tr. & Sav. Bk.,* 340 U.S. 47;[2] *New York* v. *Maclay,* 288 U.S. 290.

The District Court in this case recognized the above when it held (R. 66) that, to prevail over the United States, Hawkins must fall within one of the four protected classes. The court further held that she was obviously not a mortgagee, pledgee, or judgment creditor, and, therefore, could prevail only if she was a "purchaser" of the property before the Government's lien was filed for record. (R. 66.)

The real basis for the District Court's decision that Hawkins was a "purchaser" is that the Alaskan statute was enacted by the Federal Congress. We submit that the question is whether the Congress, in enacting Section 3672, intended that the term "purchaser" should include residents of the Territory of Alaska, while admittedly it did not intend to include persons given that status under local laws enacted by the states. It must not be forgotten that in legislating for the territories the Congress exercises the combined powers of the general, and of a state government. *American Insurance Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 545; *Benner* v. *Porter,* 9 How. 235, 242; *National Bank* v. *County of Yankton,* 101 U.S. 129. In *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, the Court said (p. 317):

> The national government may do for one of its dependencies whatever a state might do for itself

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[2] The fact that here the second assessment list was received by the Collector subsequent to the date Hawkins' attachment issued is immaterial. The same was true in *United States* v. *Security Tr. & Sav. Bk.* See the case below, *sub nom. Winther* v. *Morrison,* 93 Cal. App. 2d 608, 209 P. 2d 657. The material fact is that notice thereof was filed prior to the date judgment was secured.

> or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible. * * *

Clearly the attachment statute which the Congress enacted for Alaska falls within the scope of state legislation. As the District Court points out (R. 69), the Alaskan statute was adopted *verbatim* from the laws of Oregon, "the wording of which is identical with that of our statute." In *Allen* v. *Myers,* 1 Alaska Rep. 114, the court said (p. 118):

> In passing the Act of June 6, 1900 (31 Stat. 321, c. 786), commonly called the "Alaska Code", Congress exercised its power as a state government, and that Code, which is practically identical with that in Oregon and other code states, is to be considered and construed as if enacted by the Legislature of a State.

In such circumstances, it would take clear and compelling language to impute to Congress the intention when in 1913 it enacted Section 3672 to give a preferential status to residents of Alaska over residents of continental United States and its other territories. We submit that to so hold would be contrary to the import of the decisions of the Supreme Court. Cf. *Burnet* v. *Harmel,* 287 U.S. 103, wherein it was held that in applying a federal taxing statute, the purpose of Congress controls, and that in the absence of language evidencing a different purpose the statute is to be given a uniform application to a nationwide scheme of taxation; that state law may control only when the operation of the federal

taxing act by express language or by necessary implication makes its own application dependent upon state law.

In *United States* v. *Gilbert Associates,* 345 U.S. 361, involving the meaning of the term "judgment creditor" as used in Section 3672, the Court said (p. 364):

> A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a "judgment creditor" should have the same application in all the states.

And further, following the logic of Justice Jackson's concurring opinion in the *Security Tr. & Sav. Bk.* case, the Court said (p. 364):

> In this instance, we think Congress used the words "judgment creditor" in Section 3672 in the usual conventional sense of a judgment of a court of record, since all states have such courts. * * *

And cf. *United States* v. *Eisinger Mill & Lumber Co.,* decided by the Court of Appeals of Maryland July 2, 1953 (1953 C.C.H., par. 9504), holding that a mechanic lienor is not a "pledgee" within the meaning of Section 3672.

We submit, and no reason has been suggested to the contrary, that the term "purchaser" as used in Section 3672 is used in its conventional sense.[3] There have been but few decisions construing the term "purchaser" as therein used. In *National Refining Co.* v. *United States,* 160 F. 2d 951 (C.A. 8th), the court said (p. 955):

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[3] Cf. *Grossman* v. *City of New York,* 188 Misc. 256, 66 N.Y.S. 2d 363, holding that a mechanic lienor was a "purchaser" under the statute, and *Cranford Co.* v. *Leopold & Co.,* 272 App. Div. 831, 70 N.Y.S. 2d 183, which followed the *Grossman* case. These cases are contrary to the *Security Tr. & Sav. Bk.* case and the *Gilbert Associates* case. See *United States* v. *Eisinger Mill & Lumber Co., supra.*

> * * * one who, for a valuable present consideration, acquires property or an interest in property is a "purchaser" within the meaning of 26 U.S.C.A., Int. Rev. Code, Section 3672. * * *

The undisputed facts here show that Hawkins was not a "purchaser" in the conventional use of that term. A purchaser acquires title to the property purchased. Here, Hawkins had because of the attachment a mere inchoate lien, and any acquisition of title was contingent upon a future judgment. See *MacKenzie* v. *United States, supra; United States* v. *Security Tr. & Sav. Bk., supra;* and *United States* v. *Gilbert Associates, supra.* Her lien gave her no right to the property before it had been perfected. Until that time she had merely a power over the property "and not an actual interest in it." See *Conrad* v. *Atlantic Insurance Co.,* 1 Pet. 386, 444.

CONCLUSION

The decision of the District Court is erroneous and should be reversed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General.
Ellis N. Slack,
A. F. Prescott,
Edward W. Rothe,
Special Assistants to the Attorney General.

Seaborn J. Buckalew,
United States Attorney.
Arthur D. Talbot,
Assistant United States Attorney.

September, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 269964 305

No. 13,887

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JEWEL HAWKINS,
Appellee.

On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

BAILEY E. BELL,
WILLIAM H. SANDERS,
Central Building, Anchorage, Alaska,
Attorneys for Appellee.

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No. 13,887

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BRIEF OF APPELLEE.

The statement of fact as to the issues involved in the Appellant's Brief, on pages 1, 2 and 3, are apparently correct, and the jurisdictional allegations therein are admitted, and the question presented is clear, except that it should include Sections 3670 and 3671, of the Internal Revenue Code, as they are set forth on page 4 of Appellant's Brief. We must disagree with the statement of fact in a few very limited instances. Especially, there was no proof that on December 27-28, 1949, the Collector of Internal Revenue received the Commissioner's assessment lists containing assessments of withholding and Federal Insurance Contributions Act taxes against Lawrence Savage for the

taxable quarter ending September 30, 1949, totaling $2,711.90, plus penalties and interest, and notified Savage of the assessments and demanded payment, because this statement is not founded upon any adequate testimony or evidence. Also, Exhibits 1 and 2 introduced by the Appellant, if properly admitted, would lead one to believe that demand was made, although no proof thereof is in the record. We contend that neither of the liens were properly perfected and that no demand was ever made of the taxpayer for the payment of the taxes referred to in the liens. However, we do not think it will be necessary to resort to those contentions in determining this law suit, and that the same should be affirmed upon the reasons given by the late Hon. Anthony J. Dimond in his opinion, now found in 110 Fed. Sup. 619, also set out in detail in the Transcript of Record in this case, commencing on page 57 and extending over to page 71. The contention that Congress did not have the power to accord special treatment to the claims of residents of Alaska will be carefully analyzed in this brief. We wish to first take the cases relied upon by Appellant and attempt to give this Honorable Court our contention in relation thereto.

Apparently Appellant relies principally upon *United States v. Security Trust & Savings Bank, Executor, et al.,* 340 U.S. 47. The late Judge Dimond, our District Judge, analyzed the distinction between that case and our case and considered it fully and completely in his opinion, and after re-reading it again and again I feel confident that this California

case does not apply, due to the fact that the Supreme Court of the United States took a ruling of the Supreme Court of California holding that the attachment lien under the laws of that State was contingent or inchoate, and on page 49 of this decision you find these words:

> "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by the Court. *On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' Illinois v. Campbell,* 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissegur v. Yarbrough*, 29 Cal. 2d 409, 412, 175 P. 2d 830, 831, by stating that, 'The attaching creditor obtains only a potential right or a contingent lien * * *' Examination of the California statute shows that the above is an apt description. The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from every becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a lis pendens notice that a right to perfect a lien exists.
>
> "Nor can the doctrine of relation back—which by process of judicial reasoning merges the at-

> tachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere 'caveat of a more perfect lien to come.' *New York v. Maclay,* 288 U. S. 290, 294." (Emphasis ours.)

The California law classifies the lien of an attachment as being inchoate and contingent, depending for its validity on the rendering of a judgment thereon, while the Alaskan law on attachment is an act of the United States Congress, a special act for Alaska that has been in effect for years, and by the very act itself places the attaching creditor in exactly the same position as an innocent purchaser for value.

We find in A.C.L.A. 1949, Section 55-6-67, which is an act of Congress especially passed as the laws of Alaska, which reads as follows:

> "§55-6-67. PLAINTIFF'S RIGHTS AGAINST THIRD PERSONS: LIABILITY OF PERSONS FAILING TO TRANSFER PROPERTY TO MARSHAL. From the date of the attachment until it be discharged or the writ executed, *the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached,* subject to the conditions prescribed in the next section as to real property. Any person, association, or corporation mentioned in subdivision three of the section last preceding, from the service of a copy of the writ and notice

> as therein provided, shall, unless such property, or debts be delivered, transferred, or paid to the marshal, be liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied." (Emphasis ours.)

The Courts of Alaska have recognized this as the law since its passage. See *Meredith v. Thompson,* 4 A. 360, which case held:

> "The attaching plaintiff is deemed a purchaser in good faith for value from the time of the actual levy of the writ of attachment or execution."

Another case, *Cowden v. Wilde Goose M. & T. Co.,* 199 F. 561, this Ninth Circuit Court held that:

> "Where subsequent to the attachment of the property of a mining corporation a receiver of its property was appointed in an action to which the attachment plaintiffs were not parties, the mere appointment of the receiver did not divest the liens acquired by said plaintiffs *who must be deemed purchasers in good faith and for value under this section."* (Emphasis ours.)

It seems that this federal statute, especially passed as the governing laws of Alaska, controls as to priorities in this case, and the Supreme Court case, construing the California statutes (340 U. S. 49) has no bearing on this case before the Court.

The other case that Appellants apparently relied upon for reversal is *MacKenzie v. United States,* 109 F. 2d 540. This case was decided by the Ninth Cir-

cuit on February 5, 1940, and construes the exact same California attachment statute as was construed by the United States Supreme Court in the case of *United States v. Security Trust & Savings Bank, Executor, et al.,* 340 U.S. 47. All explanations concerning the Supreme Court case apply equally to the *MacKenzie* case, and therefore I will not quote at length therefrom. That case holds that the lien of the government for the taxes shall not be valid as against any mortgagee, purchaser or judgment creditor until notice thereof has been filed by the collector in accordance with the law of the state or territory in which the property subject to the lien is situated, whenever the state or territory has by law provided for the filing of such notice. It will surely be conceded that the statutes of Alaska provide for the filing of the tax lien in the office of the United States Commissioner, ex-Officio Recorder of the precinct in which the property is situated. Therefore, the lien of the United States did not attach until the tax liens were filed, which was after the attachment lien had already become complete.

In the case relied upon by Appellant, *New York v. Maclay, et al., Receivers, et al.,* 288 U.S. 290, this case is adverse to the contention of Appellants if analyzed in its true sense. However, it did hold that debts due by an *insolvent* corporation to the United States have priority over claims of a state for franchise tax due, but not liquidated.

We cannot see how this case could possibly be of assistance to Appellant in the case at bar.

In the above cited case reference is made to *Thelusson v. Smith,* 2 Wheat. 396, 426, and we quote a part thereof as follows:

> "The ruling there was that the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the statute *unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession."* (Emphasis supplied.)

In the case at bar a seizure had been made by attachment prior to the filing of the tax lien, and the money had been attached by the marshal quite some time prior to the United States perfecting its tax lien. The above cited case, at least indicates, that if seizure had been made and the lien made specific, as in the case at bar, it would prevail over the tax lien created later by the Appellant.

We have carefully examined the case of *Allen v. Myers* cited by Appellant and quoted from on page 11 of their brief. While the quotation there stated is quoted correctly from this case, yet they overlooked or failed to quote the few lines above on page 118, which are: "In legislating for Alaska, 'Congress exercises the combined power of the general and of a state government,' " and cite quite a number of cases.

It is our contention and was so found by the opinion of the late Hon. Anthony J. Dimond that the attachment statute referred to in his opinion was the act of the Congress of the United States and a special act creating the laws of the Territory of Alaska, and is

still in full force and effect and is controlling in this case because by the laws of the United States affecting the Territory of Alaska, an attaching creditor becomes an innocent purchaser for value as provided in said statute, 56-6-67, A.C.L.A. 1949.

The contention of Appellant that the act of Congress in passing the attachment laws for the Territory of Alaska amounted to an act of the Territorial Legislature, if not carefully considered might sound tenable. But, its contention that *Allen v. Myers,* 1 Alaska 114, was controlling in the matter would, of course, be lightly considered, as the *Allen v. Myers* case is not in point with the facts here.

It is our contention that Congress acted within its general powers in passing the attachment act referred to by the Hon. Anthony J. Dimond in this case, and that Congress has more power in passing laws for the Territory of Alaska than it has in passing laws for the United States, in that only a very few paragraphs of the Constitution of the United States restrict Congress in the passing of laws for any Territory, including Alaska.

A long time ago, in the old case of *Downes v. Bidwell,* 182 U.S. 244, Mr. Justice Brown wrote one of the most enlightening opinions of all times on this question. He considered all of the previously decided cases, including *DeLima v. Bidwell,* the famous *Dred Scott* case, and a large group of other cases. The *Downes v. Bidwell* case has recently been cited with approval in *Hooven and Allison Co. v. Evatt,* 324 U.S. 652, a part of said recent case we will later cite.

In the *Downes v. Bidwell* case, the United States Supreme Court held that "under the Constitutional power to make treaties, there was ample power to acquire territory and to hold and govern it under laws to be passed by Congress * * *" (page 254).

On page 255, we find these words in this famous opinion:

> "The administration party, through Mr. Elliott of Vermont, replied to this that 'the States, as such, were equal and intended to preserve that equality; and the provision of the constitution alluded to was calculated to prevent Congress from making any odious discrimination or distinctions between States. It was not contemplated that this provision would have application to colonial or territorial acquisitions.'"
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> * * * * * * *
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> "These statutes may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution, Art. I, sec. 9, that declares that no preference shall be given to the ports *of one State over those of another.* It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of States within the meaning of the Constitution." (Emphasis ours.)

On page 256 of this same opinion, we find:

> "The very treaty with Spain under discussion in this case contains similar discriminative pro-

visions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. By Art. IV the United States agree 'for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States'—a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, *if ports of the Philippine Islands be ports of the United States.*" (Emphasis ours.)

Then on page 257, and extending over on to page 258, we find the following:

"So, too, on March 6, 1820, 3 Stat. 545, c. 22, in an act authorizing the people of Missouri to form a state government, after a heated debate, Congress declared that in the territory of Louisiana north of 36° 30′ slavery should be forever prohibited. It is true that, for reasons which have become historical, this act was declared to be unconstitutional in Scott v. Sandford, 19 How. 393, but it is none the less a distinct annunciation by Congress of power over property in the territories which it obviously did not possess in the several States.

"The researches of counsel have collated a large number of other instances, in which Congress has in its enactments recognized the fact that provisions intended for the States did not embrace the territories, unless specially mentioned. These

are found in the laws prohibiting the slave trade with 'the United States or territories thereof;' or equipping ships 'in any port or place within the *jurisdiction* of the United States;' in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing States, and others of which extended them expressly to the territories, or 'within the exterior boundaries of the United States;' and in the acts extending the internal revenue laws to the Territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the territories, as the circumstances of each case seemed to require, *and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the States.* Indeed, whatever may have been the fluctuations of opinion in other bodies, (and event this court has not been exempt from them,) Congress has been consistent in recognizing the difference between the States and territories under the Constitution." (Emphasis supplied.)

On page 266, the Court, in discussing the famous opinion of Chief Justice Marshall, said:

"He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the Superior Courts of Florida held their office for four years; that 'these courts are not constitutional courts in which the judicial power conferred by the Constitution on the gen-

> eral government, can be deposited;' that 'they are legislative courts, created in virtue of the general right of sovereignty which exists in the government,' or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress, in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a state government."

In referring to the Courts of the Territory of Florida, this famous jurist stated on page 267:

> "We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular."

Then, again at the bottom of page 267, extending over on to page 269, we quote:

> "That the *power over the territories* is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 422, and in *United States v. Gratiot,* 14 Pet. 526. So, too, in *Mormon Church v. United States,* 136 U.S. 1, in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language: 'The power of Congress over the territories of the United States is general and

plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the Territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution,) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete * * * Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress

derives all its powers, than by any express and direct application of its provisions.' See also, to the same effect, *National Bank v. County of Yankton,* 101 U.S. 129; *Murphy v. Ramsey,* 114 U. S. 15." (Emphasis supplied.)

Quoting again from this case, on page 269, we find reference to the case of *Reynolds v. United States,* 98 U.S. 145:

"In Reynolds v. United States, 98 U. S. 145, a law of the Territory of Utah, providing for grand juries of fifteen persons, was held to be constitutional, though Rev. Stat. sec. 808 required that a grand jury empanelled before any Circuit or District Court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the Circuit and District Courts. The territorial courts were free to act in obedience to their own laws."

Again on page 274, we quote from the same case:

"The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous, unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the States—a claim quite inconsistent with the position of the court in the *Canter* case."

Then on page 285, in referring to the adoption of the Constitution of the United States, we find the following words.

"The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them."

* * * * * * *

"If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories, as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to States, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them."

In summing up this case, on page 287 these words are used:

"We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

"The judgment of the Circuit Court is therefore *Affirmed.*"

This famous case was referred to very recently in the case of *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, and from page 673 thereof we quote:

"That our dependencies, acquired by cession as the result of our war with Spain, are territories

belonging to, but not a part of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima v. Bidwell, supra; Dooley v. United States, supra,* 182 U. S. 222; *Downes v. Bidwell,* 182 U. S. 244; *Dooley v. United States,* 183 U. S. 151; and see also *Public Utility Commissioners v. Ynchausti & Co.,* 251 U. S. 401, 406-407; *Balzac v. Porto Rico, supra.* This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by Sec. 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' *Dooley v. United States, supra,* 183 U. S. at 157; *Dorr v. United States,* 195 U. S. 138, 149; *Balzac v. Porto Rico, supra,* 305; *Cincinnati Soap Co. v. United States,* 301 U. S. 308, 323.

"In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See *Downes v. Bidwell, supra; Hawaii v. Mankichi,* 190 U. S. 197; *Dorr v. United States, supra; Dowdell v. United States,* 221 U. S. 325, 332; *Ocampo v. United States,* 234 U. S. 91, 98; *Public Utility Commissioners v. Ynchausti & Co., supra,* 406-407; *Balzac v. Porto Rico, supra.* And in general the guaranties of the Constitution, save as they

> are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See Balzac v. Porto Rico, supra. The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States, do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of Secs. 8 and 9 of Article I of the Constitution, such articles may be taxed by Congress and without apportionment. Downes v. Bidwell, supra. It follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from the territory, which is not a part of the United States, into the Territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable."

This clearly follows the established rule that Congress in legislating for the Territory of Alaska, and other territories, is not subject to the same constitutional limitations as when it is legislating for the United States.

We contended before the Hon. Anthony J. Dimond, trial judge, and still contend that the attachment statute effective in the Territory of Alaska was an act of Congress passed while acting in its general powers legislating especially for the Territory of Alaska, and is therefore a special act and that the

general act referred to by the appellants has no effect whatsoever on this special act of Congress created for Alaska. In support of that position, we wish to quote from *Rodgers v. United States,* 185 U.S. 83, and it seems to us that the first syllabus taken from this *Rodgers* case clearly follows the exact holding of the case and clearly outlines that decision. The first syllabus reads:

> "Where there are two statutes, the earlier special and the later general, (the terms of the general being broad enough to include the matter provided for in the special,) the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

Another case that holds the same thing is *George Washington v. Charles W. Miller,* 235 U.S. 422, 35 Sup. Ct. 119, 59 Law. Ed. 295, and quoting the opinion from 35 Sup. Ct., on page 122, we find the following statement:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146, 40 L. Ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Great-

house, 166 U.S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog [ex parte Kaug Gi-Shin-Ca], 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rogers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

"No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians, whose affairs were peculiarly within its control. Taylor v. Parker, 235 U. S. 42, 59 L. ed. ....., 35 Sup. Ct. Rep. 22. See also Re Davis, 32 Okla. 209, 122 Pac. 547."

Another case holding the same thing is *Niagara Fire Insurance Co. of New York v. Raleigh Hardware Co.,* 62 Fed. (2d) 705, the seventh syllabus of which reads as follows:

"7.—Statutes—Where separate existing statutes relate to the same subjects, earlier being special

> and latter general, presumption arises that special was intended to remain in force as exception to general."

From the body of the opinion, we quote:

> "It is elementary that statutes are to be construed together when possible, and that repeals by implication are not favored. * * * The rule is well settled that 'where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general'. Washington v. Miller, 235 U. S. 422, 428, 35 S. Ct. 119, 59 L. Ed. 295; Rodgers v. U. S., 185 U. S. 83, 87-89, 22 S. Ct. 582, 584, 46 L. Ed. 816; Townsend v. Little, 109 U. S. 504, 512, 3 S. Ct. 357, 27 L. Ed. 1012."

The United States Supreme Court, a long time ago, in the old case of *Townsend v. Little and others,* 3 Sup. Ct. Rep. 357, actually decided our question here more directly in point than any of the cases cited. From page 362 of Volume 3 above referred to, we quote:

> "According to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring

deeds generally to be executed with two witnesses."

As is the general rule laid down by the United States Supreme Court they hesitate to change an old ruling, or the adoption by the lower Courts of a rule effecting any statute. Now, the attachment statute in this case, above referred to, has been upheld for more than fifty years and each time that the matter has been before this Ninth Circuit Court of Appeals, it has been held to mean exactly as it states. One case in particular, the *Cowden v. Wilde Goose Mining & Trading Company,* 199 Fed. 561, decided by the Ninth Circuit Court of Appeals on October 7, 1912, upholds the statute literally. The third syllabus reads:

"3. Receivers (Sec. 77)—Attachment—Lien—Divestment.

"Carter's Ann. Code Civ. Proc. Alaska, Sec. 141, provides that from the date of an attachment, until it is discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, real and personal. *Held* that, where a receiver was appointed for a corporation after its property had been attached in an action to which the plaintiffs in the attachment were not parties, such appointment did not divest the attachment liens."

Then, on page 566, we find these words:

"(3) The laws of Alaska also provide that:

" 'From the date of the attachment until it be discharged or the writ executed, the plaintiff, as

against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real and personal, attached.' Carter's Alaska Codes, p. 174.

"As has been stated, the property sold under the executions in question was attached August 18, 1906, and the receiver was not appointed until August 13, 1907, and then in an action to which the plaintiffs in the attachment cases were not parties. The mere appointment of the receiver, therefore, did not divest the liens acquired by the attachments. High on Receivers, Sec. 440; People v. Finch, 19 Colo. App. 512, 76 Pac. 1120; Pease, Sheriff, v. Smith, Receiver, 63 Ill. App. 411."

Since this is a special law passed by the United States Congress more than 50 years ago, and all construction of said statute has been to uphold it, we are of the opinion and contend that Congress, in passing this statute, did an act under its general and plenary powers with no restriction in the Constitution against the passage of the law, and no general statute passed prior or subsequent would have any effect on this statute and the same remains a part of the organic law of the United States of America, effective in Alaska, and is controlling in all matters until repealed or modified by the Congress of the United States.

Appellants rely on the case of *United States v. Gilbert Associates, Inc.,* 345 U.S. 361. We will not try to analyze this case any further than to say that it has no application to the law involved in the case

at bar. On page 365 of the opinion, you find the statement:

> "*But since the taxpayer was insolvent, the* United States claims the benefit of another statute to give it priority, Sec. 3466 of the Revised Statutes, 31 U.S.C. (1946 ed.) Sec. 191, the provisions of which are set forth in the margin." (Emphasis ours.)

The act itself (Sec. 3466) is set out in the margin below and is prefaced with the words:

> "Whenever any person indebted to the United States is insolvent * * *"

Therefore, the case last cited is not in point with our case before the Court now.

We contend that the judgment is correct in holding that the appellee's attachment lien dated April 19, 1950, is a good, sufficient and valid lien and is prior in time and right to the government's subsequent tax lien, if, in fact, they have a lien, for the reason that Section 55-6-67 of the Alaska Compiled Laws, Annotated, 1949, states:

> "From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property."

Title 26, Section 3672, states that certain liens are invalid without notice to mortgagees, pledgees, *purchasers,* and judgment creditors, until notice thereof has been filed by the collector. The notice of tax lien was filed by the government on June 13, 1950, long after the appellee's attachment lien. Consequently, by reasoning afforded our Alaska statute, the appellee is deemed a purchaser in good faith and therefore would come under Section 3672 of Title 26, as quoted above, and therefore the appellee in the case at bar would have a lien prior in time and superior to the government's lien in this case.

The United States did not have a lien on the property involved herein (if at all they did have a lien, which we deny) until June 13, 1950, when said notice of government tax lien was filed with the United States Commissioner at Anchorage, Alaska, and that the appellee's attachment lien dated from April 19, 1950, was superior in right and time to this government lien.

It may be conceded that the effect and operation of a state lien in relation to a claim of priority by the United States is a federal question. However, in determining whether the lien under state law is sufficiently specific and perfected to defeat the government's priority, the federal court should give weight to the state court's characterization of the lien, although such characterization is not conclusive. *Illinois v. Campbell,* 329 U.S. 362; *U. S. v. Security Trust & Savings Bank,* 340 U.S. 47.

We repeat that in making its arguments, the government has relied greatly on the case of *U. S. v. Security Trust & Savings Bank,* supra, in which the Court characterized the lien acquired under the California statute relating to the attachment proceedings as being contingent or inchoate. But solely on the basis of this decision. That the Supreme Court based its decision entirely upon the characterization of the lien accorded to it by the highest Court of its birthplace, should not be subject to any doubt. In its discussion of this same decision, in the case of *Citizens Coal Company v. Capital Cleaners & Dyers, Inc., et al.,* 233 Pac. (2d) 377, the Court said:

> "The Supreme Court held that the federal tax liens were superior to the prior attachment lien *because the Supreme Court of California had described the attachment lien under its Code of Civil Procedure as a contingent inchoate lien.* The United States Supreme Court stated that, 'The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. * * * (But) if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' " (Emphasis supplied.)

Statements of federal Courts in recent decisions have been to the same effect.

In the case of *United States of America v. Michael P. Acri, et al.,* Civil No. 25,807, October 10, 1952, also cited in Commerce Clearing House, Inc., Vol. 5, of the 1953 Standard Federal Tax Reporter, Case No.

9104, now found in 109 Fed. Supp. 943, the United States District Court for the Sixth Circuit, in granting priority to an attachment lien under Ohio law, said:

> "The case of U. S. v. Security Trust & Savings Bank, supra, relied upon by the Government dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute."

The United States District Court for the Fifth Circuit had this to say in *Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe Ins. Co.,* 107 F. Supp. 405:

> "The government contends that notwithstanding the fact that the garnishment lien attached prior to the time of the fixing of its lien under 53 Stat. 448, as amended, 26 U.S.C. Sects. 3670, 3671 and 3672, that it is entitled to the money on deposit and points to United States v. The Security Trust & Savings Bank, 340 U. S. 47.
>
> "The case is hardly an authority here. It relates to an attachment lien under the California Code. In that case the federal tax lien was recorded subsequent to the date of the attachment lien but before the attaching creditor obained judgment. In that case, also, the state court, itself, describes the lien as inchoate, and the Supreme Court accepts that classification as practically conclusive. In that sort of a situation the attachment lien is contingent, and the United States tax lien is not defeated by a contingent inchoate lien prior in time."

And from the opinion on page 406, we quote at length:

> "The spirit of this statutory provision vitalizes the thought that those who hold valid liens, such as are mentioned in the statute, are not affected by government liens subsequently acquired.
>
> "The ordinary rule with reference to the preference of government claims over private claims has no application here. This case is ruled by the securing of the first lien. That first lien is not crippled nor made subordinate by the acquisition of a subsequent lien by the National Government.
>
> "See also United States v. 52.11 Acres of Land in St. Charles County, Mo., D.C., 73 F. Supp. 820, and United States v. Waddill, Holland & Flinn, Inc., 323 U. S. 353, 65 S.Ct. 304, 89 L. Ed. 294, where the reasoning of the court explains the validity, priority, and vitality of the lien family. Other cases that are helpful are Buerger v. Wells, 110 Tex. 566, 222 S.W. 151; Snyder Motor Company v. Universal Credit Corp., Tex. Civ. App., 199 S.W. (2d) 792; Board of Sur'rs. of Louisiana State University v. Hart, 210 La. 78, 26 So. (2d) 361, 174 A.L.R. 1366; Focke v. Blum, 82 Tex. 436, 17 S.W. 770; Ash v. Aiken, 2 Tex. Civ. App. 83, 21 S.W. 618; Holloway Seed Co. v. City National Bank of Dallas, 92 Tex. 187, 47 S.W. 95; Jobbers' Distributing Co. v. Goldstein, Tex. Civ. App., 265 S.W. 1085; Voelkel-McLain Co. v. First National Bank, Tex. Civ. App., 296 S.W. 970; Globe & Rutgers Fire Ins. Co. v. Brown, D.C., 52 F. (2d) 164; and Daniel v. East Texas Theaters, Tex. Civ. App., 127 S.W. (2d) 240."

From the foregoing, it may be observed that applicability of *U. S. v. Security Trust and Savings Bank,* supra, as an authority in determining the relative priorities of state and federal liens, is limited; and should be restricted to those cases where the subject local statute and/or expression of the highest state Court is similar in scope to that of California. Insofar as the general problem lien priority is concerned, adjudication should be based on the authority of *Illinois v. Campbell,* supra, and subsequent federal decisions having for examination state lien statutes broader in scope than that of the California statute.

Whether a "fully perfected and specific" state lien would defeat a subsequent tax lien claimed by the government is a question never determined by the United States Supreme Court, so far as we are able to ascertain, but there have been strong indications from the decisions of that Court in the affirmative. *Illinois v. Campbell,* supra; *United States v. Waddill Co.,* 323 U.S. 353; *In re Matter of Gilbert Associates, Inc.,* Supreme Court of New Hampshire, No. 4122, July 1, 1952.

In *Illinois v. Campbell,* supra, the Supreme Court states that in order to overcome the statutory priority accorded a federal tax lien, "the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States v. Knott,* 298 U.S. 544; (2) the amount of the lien, *United States v. Waddill Co.,* 323 U.S.

353; and (3) the property to which it attaches, *United States v. Waddill Co.,* supra; *United States v. Texas,* supra; *New York v. Maclay,* supra. In the opinion of the Court, the Illinois lien before it was not sufficiently specific or perfected to defeat the government's priority, since it did not attach to specific property of the debtor.

The government argues that because the Supreme Court of the United States has consistently relegated state liens—inchoate though classified by their own Courts as being specific and perfected—to a priority secondary to that of federal tax liens, that an attachment lien created pursuant to the statute of the Territory of Alaska is inchoate in nature and possesses the same status. The fallacy of this argument may be easily demonstrated. With the exception of *United States v. Security Trust and Savings Bank of San Diego,* supra, not one of the authorities cited in support of this argument, cited in the case below or here, involved a state attachment lien. All were indefinite in at least one of the "three respects as of the crucial time". *Illinois v. Campbell,* supra. Is the attachment lien herein involved not wanting in any one of the three requirements? No question exists as to the identity of the lienor; nor is the amount of the lien subject to any doubt; and, specific funds have been set aside as the subject of the attachment.

United States v. Security Trust and Savings Bank of San Diego, supra, may be dismissed as an authority applicable to the issue herein involved. Since the

Supreme Court placed *sole reliance on a California state Court's characterization of its California statute,* the decision thereupon rendered is of limited weight, and much of the discussion in the nature of dicta. Other than the superficial resemblance which lien statutes ordinarily bear to one another, the California and Alaska statutes have nothing in common.

There is a further distinction in the case at bar and this California case in that the California case involved an attachment on real estate, whereas our case involves personal property of which the appellee, upon its valid attachment, took immediate and sole possession of the property, and according to the Alaska Compiled Laws, Annotated, 1949, Section 55-6-67, the appellee, upon an attachment, is deemed to be a purchaser in good faith for a valuable consideration, from the date of the attachment. The case of *Meredith v. Thompson,* 4 A. 360, and the other Alaska cases above cited, interpreted this statute as giving the attaching plaintiff the same standing and rights as a purchaser in good faith for a valuable consideration from the actual date of the levy of the attachment.

Cases granting priority to liens arising under local statutes of this character over federal tax liens subsequently created, are legion. In the case of *United States, et al. v. Yates,* 204 F. (2d) 399, decided after *Illinois v. Campbell,* supra, where a Texas attachment statute similar in effect to our own was involved, the Texas Court of Civil Appeals held that a specific

attachment lien, levied on or before the date on which the federal government fixed its tax lien on the proceeds of a sale of the attached proprty, was entitled to priority over the government's lien, *though the attaching creditor's claims were not reduced to judgment.* The Court also said:

> "* * * the attachment lien of * * * was specific and fixed upon the date of its levy, which date was prior to the date the Government fixed its lien for unpaid taxes under Sections 3670, 3671 and 3672 * * * of the Internal Revenue Code of the United States";

and cited the case of *Louisiana State University v. Hart et al., United States, Intervenor,* 26 Southern (2d) 361, which decision is directly in point and was cited in our brief in the Court below.

Another case concerning the same point is *In re Taylorcraft Aviation Corporation,* 168 F. (2d) 808, also decided subsequent to *Illinois v. Campbell,* supra. The Sixth Circuit Court had before it an Ohio statute, under which a mechanic's lien became effective as of the date of the first delivery of labor and material. The government had made assessments and demands upon the debtor for payment of taxes prior to the date upon which the last labor and material were furnished to the debtor, but notice of lien for taxes as required by Section 3672 of the Internal Revenue Code was not filed by the government until after the affidavit for mechanic's lien was filed as required by Ohio statute. The Court held *that the Ohio law determined the effectiveness of the local lien, subject to*

examination by the federal Courts, and that the mechanic's lien in the instant case was specific, attached to specific property, and was prior in time to the date upon which the federal tax liens became perfected.

In the case of *United States v. Michael P. Acri, et al.,* in the United States District Court for the Northern District of Ohio, Eastern Division, Civil No. 25,807, October 10, 1952, now published in 109 Fed. Supp. 943, we have a case decided by a federal Court subsequent to *United States v. Security Trust and Savings,* supra. In that case the debtor's personal property in a safe deposit box was attached and subsequent to that date the government filed notice of its tax lien. Under Ohio law, a valid lien of the requisite specificity was acquired on the debtor's property as of the date of the commencement of the attachment proceedings. The decisions of Ohio Courts had characterized such attachment lien as an "execution in advance", of equal standing with an execution lien, and to be treated as perfected at the time the attachment is made. The Court stated:

> "that the effect and operation of a state lien in relation to a claim of priority by the United States is a federal question. Illinois v. Campbell, 329 U.S. 362; U. S. v. Security Trust and Savings Bank, 340 U. S. 47. The federal court must determine whether the lien under state law is sufficiently specific and perfected to defeat the Government's priority, and in making such determination it should give weight to the state court's characterization of the lien, although such characterization is not conclusive."

To the same effect are the following cases: *Albert Klinghoffer, et ano. v. Peter's Ridgewood, Inc., et ano.,* in the City Court of the City of New York, County of New York, Calendar No. 56, November 10, 1950; *Petition of Gilbert Associates, Inc.,* in the Supreme Court of New Hampshire, No. 4122, July 1, 1952. (We trust the Court will forgive us for not being able to give better information as to where the above cases are found; but this is taken from a tax service and we can find no better citations in our available library.) *U. S. v. Canadian American Co., Inc., et al.,* 108 Fed. Supp. 206, is in point and and the holding is very similar. Also, the following case supports our contention: *In the Matter of Ann Arbor Brewing Company,* 110 Fed. Supp. 111.

The case of *Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe Ins. Co.,* 107 F. Supp. 405, decided by the Fifth United States District Court on October 7, 1952, is a decision resting squarely on the same set of facts as raised by the instant litigation. That case involved a garnishment under the Texas statute upon funds belonging to the debtor, which had been tendered into the registry of the Court. The Federal Government interpleaded, the government contending that notwithstanding the fact that the garnishment lien attached prior to the time of the fixing of its lien under Sections 3670, 3671 and 3672, of the Internal Revenue Code, that it is entitled to the money on deposit and points to *United States v. The Security Trust & Savings Bank,* 340 U.S. 47, supra. After dismissing the California case as an

authority in the proceeding before it (reason previously given in this brief), the Court went on to say:

> "It will be noticed that the United States statute mentioned above provides that, 'such (statutory) lien shall not be valid as against any mortgage, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector' in the office provided by the law of the state for such filing * * * prior to the securing of the garnishment lien.
>
> "The spirit of this statutory provision vitalizes the thought that those who hold valid liens, such as are mentioned in the statute, are not affected by government liens subsequently acquired.
>
> "The ordinary rule with reference to the preference of government claims over private claims has no application here. This is ruled by the securing of the first lien. That first lien is not crippled nor made subordinate by the acquisition of a subsequent lien by the national government."

II.

We contend that if the judgment is correct, the reason given by the trial judge in arriving at the conclusion is immaterial. If the judgment is correct under any theory of law, then the judgment and decision would be affirmed by this Court.

In the trial below, we presented to the Court another question that we believed, and now believe, to be good. However, the trial judge did not mention this contention, but decided the case on another

theory. But, this particular contention was briefed and urged to the Court:

A. That the United States of America, Intervenor, had no right to a lien in this case at all, for the reason that there was no proof at any time in the case of a demand having been made of the tax debtor for the payment thereof;

B. That the liens filed in the case were not filled out properly, not verified, did not amount to a lien within the law affecting property in the Territory of Alaska, and were, therefore, not binding against the plaintiff in this action. The dates of filing the suit, the attachment, the tax liens, and every proceeding, are covered by the opinion of the late Hon. Anthony J. Dimond, and without reiterating them here, we call the Court's attention to the opinion, commencing on page 57 of the transcript, and continuing on over to page 71.

C. We also call your attention to the fact that the record is silent as to the intervenor, United States of America, ever properly procuring service at all on the defendant in this action. The plaintiff filed an affidavit to obtain service by publication (Tr. 40), procured an order for publication (Tr. 38), and proceeded to get service by publication, and the motion by the plaintiff for a default judgment was filed (Tr. 50) and sustained (Tr. 51); but nowhere is there any indication and up to this time there is no judgment, in favor of the intervenor in this case. This should be fatal to

the intervenor, as it has no right to judgment of any kind in this case, this being a suit *in rem* and no affidavit filed as required by law to obtain service by publication, any act that intervenor did in furtherance of obtaining service would be void, because not based upon the filing of the necessary affidavit.

We will argue "A", "B", and "C" separately, commencing with "A":

A. THAT THE UNITED STATES OF AMERICA, INTERVENOR, HAD NO RIGHT TO A LIEN IN THIS CASE AT ALL, FOR THE REASON THAT THERE WAS NO PROOF AT ANY TIME IN THE CASE OF A DEMAND HAVING BEEN MADE OF THE TAX DEBTOR FOR THE PAYMENT THEREOF.

All that is required of this to sustain this position, is to carefully read the proceedings had before the late Hon. Anthony J. Dimond, as shown by the Transcript, page 86, and you will see that there is positively no testimony of an actual demand ever having been made for payment of the taxpayer, Lawrence Savage, d/b/a Lee Savage Paint Company.

The attachment of the Plaintiff-Appellee was long prior to the filing of any of the notices of tax lien, and even the Complaint of the Intervenor does not plead a demand for the payment of the taxes. We contend that this is an allegation necessary and must be supported by proof before the Government can sustain its tax liens. There is positively no evidence or allegation in the Complaint of Intervention of demand having been made, or that Savage waived that

condition precedent to the creation of a lien, to-wit: demand upon the taxpayer for payment of taxes upon behalf of the Government. The Plaintiff-Appellee objected to the introduction of either of the tax liens when the same were offered in evidence (Transcript—97): "I do object to the introduction of them for the reason that they are incompetent, irrelevant and immaterial, and not sufficient for creating any lien—that the notices were not sufficient to create a lien as of themselves and were not sufficient under the laws." To this objection, Mr. Winter, Attorney for the United States, stated: "If the Court please, we do not contend that they in any way add to our lien; in other words, our levy is our usual procedure, which is only our means of enforcing our already existing lien. It is merely to show that we attempted to collect from J. B. Warrack Company, and that is the reason we have intervened in this case, is because of the attachment * * *" (Transcript—97.) Thereafter, the Court allowed Plaintiff, Appellee here, separate objections and exceptions to each of the lien exhibits D, E and F. (Transcript—98.) There not having been one word of proof anywhere in the case of a demand for the payment of taxes, we feel confident that the lien is void for the reason that the demand for payment is a condition precedent to the creation of a lien. (See: 26 U.S.C.A., Internal Revenue Code, Sec. 3670.) Section 3671 provides that the lien arises when the assessment lists are received by the Collector, unless some other date is specified by law. Section

3672 provides that the lien shall not be valid against mortgagees, pledgees, purchasers or judgment creditors until notice thereof has been filed in the office provided by the law of the State for such filing (in Alaska, United States Commissioner's Office, Ex-Officio Recorder).

It should be carefully observed that the judgment rendered by the Hon. Anthony J. Dimond in the Court below (Tr. 78) gave to the Plaintiff-Appellee, a judgment for $2,341.87, affirmed the attachment raised, issued, and served, and sustained it in its entirety. By the judgment, J. B. Warrack Company was ordered to pay the Plaintiff-Appellee, $2,341.87, clearly showing the judgment rendered by the Court related back to the date of the attachment and affirmed the same as of the date the attachment was made, and the attachment was made long prior to any liens having been filed by the Intervenor, United States of America. The District Court has never yet rendered judgment for the Intervenor-Appellant in this case.

A lien is a creature of the statute and to create a lien, the statutory procedure must be followed. A lien can be created if, and only if, the laws are scrupulously followed. Section 3670, above cited, states:

> "Property subject to lien.—If any person liable to pay any tax neglects or refuses to pay the same *after demand,* the amount * * * shall be a lien in favor of the United States * * *". (Emphasis supplied.)

showing conclusively that the statute above mentioned does not anticipate the creation of a lien until a demand has been made, and in this case, no demand has been *pleaded* or *proven;* therefore, no lien.

In order to create a lien, there must be a statement of the amount of taxes due and owing and an unequivocal demand that the taxes be paid. Demand is the condition precedent to the creation of the lien. In *United States v. Pacific Railroad, et al.,* 27 Fed. Cases 399, we quote from the body of the opinion as follows:

> "Here the act that constitutes and creates the lien is the demand. Without the demand there can be no lien, but with a just and proper demand, made in the proper way, the officer creates a lien by the very act of making the demand."

A demurrer was sustained to the Complaint in the above mentioned case for failure to allege the act of Demand, the necessary condition precedent to the creation of a lien. Further on the Court held:

> "It is conceded that demand on behalf of the United States for the payment of taxes was necessary under the statute to create the lien and to bring it into operation."
>
> *In re Baltimore Pearl Hominy Company,* 294 Fed. 921, 923.

See also:

> *Johnson v. Western Union Telegraph Co.,* 53 N.Y.S. (2d) 867.

Further down we find these words:

> "The 'demand' required by Section 3670 has been held to be a condition precedent in order to create and bring the lien into operation."
>
> *United States v. Ettleson,* 67 F. Supp. 257, 258.

The last mentioned case was later reversed (See *U. S. v. Ettleson,* 159 F. (2d) 193), but not upon the question of demand being a condition precedent to the creation of a lien.

Then, Section 3672, Title 26, U.S.C.A., requires the proper recording of the lien.

We believe that on these grounds alone we are entitled to have this judgment affirmed.

B. THAT THE LIENS FILED IN THE CASE WERE NOT FILLED OUT PROPERLY, NOT VERIFIED, DID NOT AMOUNT TO A LIEN WITHIN THE LAW AFFECTING PROPERTY IN THE TERRITORY OF ALASKA, AND WERE, THEREFORE, NOT BINDING AGAINST THE PLAINTIFF IN THIS ACTION. PLEASE FORGIVE US FOR REPEATING THAT. THE DATES OF FILING THE SUIT, THE ATTACHMENT, THE TAX LIENS, AND EVERY PROCEEDING, ARE COVERED BY THE OPINION OF THE LATE HONORABLE ANTHONY J. DIMOND IN THIS CASE.

We call your specific attention to the fact that the laws of Alaska require a lien to be verified and we further call your attention to pages 30 and 32 of the Transcript showing the printer's note, to-wit: "Not Filled Out", and just a careful examination of the liens, exhibits A & B of Intervenor, shows that they

are not properly filled out for the purpose of recording and creating a lien, even if they had pleaded and proved a notice and demand. The Complaint in Intervention (Tr. 34) no where attempts to plead a demand for the payment, or any certification of the liens, but attached thereto copies exactly like exhibits A & B. (Tr. 29 and 31.) Therefore the Complaint in Intervention was insufficient to entitle intervenor United States to a judgment.

C. AND NOWHERE IS THERE ANY INDICATION AND UP TO THIS TIME THERE IS NO JUDGMENT IN FAVOR OF THE INTERVENOR IN THIS CASE. THIS SHOULD BE FATAL TO THE INTERVENOR, AS IT HAS NO RIGHT TO JUDGMENT OF ANY KIND IN THIS CASE, THIS BEING A SUIT IN REM AND NO AFFIDAVIT FILED AS REQUIRED BY LAW TO OBTAIN A SERVICE BY PUBLICATION, ANY ACT THAT INTERVENOR DID IN FURTHERANCE OF OBTAINING SERVICE WOULD BE VOID, BECAUSE NOT BASED UPON THE FILING OF THE NECESSARY AFFIDAVIT.

The record shows on its face that no affidavit was ever filed by the Intervenor-Appellant for the purpose of getting service on the Defendant on its Petition in Intervention, and no appearance has been made by the Defendant. Therefore, the matters mentioned in the Petition in Intervention should not have been even considered by the Court in arriving at its conclusion.

CONCLUSION.

Within the plain meaning of the Alaska statutes and decisions, attachment liens are given the same effectiveness as those arising under the Ohio and Texas statutes. Where affidavit and notice have been duly filed, and service and attachment made, they become perfected, as of the time the attachment is made. They are definite and specific within the meaning of *Illinois v. Campbell,* supra, and are entitled to priority over a tax lien of the federal government which has not become perfected by filing, or where the date of such filing is subsequent in time to the effective date of the attachment or garnishment. Such liens, having the characterization accorded by Section 55-6-67 of the Alaska Statutes and decision of Territorial Courts to the same effect, are clearly within the purview of Sec. 3672, of the Internal Revenue Code. Perverted interpretations of the local statute and decisions cannot be permitted merely on the authority of a decision rendered by a Court having before it a local statute and weight of authority diametrically opposed to the intent and meaning of Territorial legislation and decisions. Later federal cases indicate this decision is to be regarded as an aberration of settled law prior to its advent. *Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe,* supra; *United States v. Michael P. Acri,* supra; *Citizens Coal Co. v. Capital Cleaners & Dyers, Inc., et al.,* 233 Pac. (2d) 377.

The Appellee contends that her lien is prior in right and time to the Government's alleged lien claim;

that if the Government has a lien at all, said lien dates from June 13, 1950; when the notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska, and that said lien is subsequent to the Appellee's lien and inferior in right and time; and that the judgment should be affirmed.

Dated, Anchorage, Alaska,
October 2, 1953.

Respectfully submitted,
BAILEY E. BELL,
WILLIAM H. SANDERS,
Attorneys for Appellee.

No. 13963

United States
Court of Appeals
for the Ninth Circuit

See Vol. 2847

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Von Orden Co., 870 Brannan Street, San Francisco, Calif.—9-4-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JOSEPH & POWERS,
JAMES P. POWERS, and
J. P. SANDERSON,
Yeon Building,
Portland, Oregon,

For Appellants.

HENRY L. HESS,
United States Attorney;
VICTOR E. HARR,
Assistant United States Attorney,
United States Court House,
Portland, Oregon,

For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civil 6763

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Plaintiffs,

vs.

DEAN ACHESON, Secretary of State of the United States of America,

Defendants.

COMPLAINT

Comes now Chin Chuck Ming and Chin Chuck Sang by their next friend and father, Chin Ah Poy, and for cause of action against the defendant complain and allege:

I.

That Chin Chuck Ming and Chin Chuck Sang, the plaintiffs, are citizens of the United States since birth and bring this action through their next friend and father, Chin Ah Poy, a citizen of the United States, and a resident of Portland, Oregon.

II.

That the defendant, Dean Acheson, is the duly appointed, qualified and acting Secretary of State of the United States of America; that the American Consul General at Hongkong is an officer of the United States and an executive official of the De-

partment of State of the United States, acting under and by the direction of the defendant as Secretary of State.

III.

That the jurisdiction of this action is conferred upon this Court by Section 503 of the Nationality Act of 1940, 8 U.S.C. 903.

IV.

That plaintiff Chin Chuck Ming was born in Toong Poon village Toyshan, Kwangtung, China, on January 15, 1933, and plaintiff Chin Chuck Sang was born in the same village on April 10, 1928, and are presently residing in Hongkong.

V.

That the plaintiffs, Chin Chuck Ming and Chin Chuck Sang, are citizens of the United States under Section 1993 of the Revised Statutes, 8 USC, 6 First Edition and Section 504 of the Nationality Act of 1940, 8 U.S.C. 904.

VI.

That Chin Ah Poy, the father of plaintiffs, was born in China on November 26, 1900, and originally arrived in the United States at Boston, Massachusetts, July 10, 1920, when he was regularly admitted into the United States as a citizen thereof on the ground of being a foreign born son of a citizen of the United States as provided for by Section 1993 of the Revised Statutes, 8 U.S.C., 6 First Edition.

VII.

That the said Chin Ah Poy went to China in 1925, 1931, 1938 and 1947, and returned to the United States in 1928, 1933, 1940 and 1949; that the said Chin Ah Poy was married in accordance with the laws of China on February 24, 1919, to Lor Shee who died in Toong Poon village on March 30, 1944; that plaintiffs were born in lawful wedlock of said marriage.

VIII.

That the plaintiffs herein claim the city of Portland, Oregon, as their permanent residence, the place of residence of their father and within the jurisdiction of this court; that plaintiffs claim the right of entering the United States of America as nationals and as citizens of said nation.

IX.

That Chin Ah Poy caused to be filed with the American Consul General at Hongkong his affidavit-application dated September 6, 1951, prepared in accordance with the regulations, for travel documents for the said Chin Chuck Ming and Chin Chuck Sang so that they would be eligible to purchase transportation to the United States in order to apply for admission as citizens thereof at a port of entry under the immigration laws.

X.

That although the plaintiffs have been steadily available for examination by the American Consul General at Hongkong, he has not issued the re-

quested travel documents; that the failure of the said Consul General to issue the documents after a lapse of so much time is unfair, unreasonable, arbitrary and is equivalent to a denial of the plaintiffs' applications and their rights as American citizens; that the plaintiffs thereby have been stopped from coming to the United States and from applying to and presenting proof of their American citizenship to the Immigration Service at a port of entry; that since the Consul General has not denied the said applications there has been no official denial and therefore the defendant would, as could be expected, refuse to take cognizance of any appeal, as under Section 50.28 of Title 22, Code of Federal Regulations, leaving the only available remedy the present action.

XI.

That the applications of the plaintiffs are being held subject to investigation, consideration and determination under a new and secret procedure devised by the American Consul General at Hongkong, limited to members of the Chinese race, not within any Regulation, but of a class restriction within the term "class legislation," in violation of law.

XII.

That the plaintiffs are citizens of the United States as aforesaid and they claim United States nationality and citizenship and bring this action in good faith and on a substantial basis.

Wherefore, plaintiffs pray for an order and judgment of this court as follows:

1. That an order, directed to the defendant, Dean Acheson, issue to provide that the plaintiff be granted a Certificate of Identity, passport or travel document, in order that he be eligible to purchase transportation to the United States and be admitted under bond for the purpose of prosecuting his claim of citizenship in this court.

2. That a decree be entered herein adjudging the plaintiff to be a citizen or a national of the United States.

3. That the plaintiff be granted such other and further relief as may be just and equitable in the premises.

JOSEPH & POWERS,

By /s/ JAMES P. POWERS,

/s/ J. P. SANDERSON,

Attorneys for Plaintiffs.

[Endorsed]: Filed December 22, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for and on behalf of the defendant above named and in an-

swer to the complaint on file herein, admits, denies and alleges as follows:

I.

Defendant denies the allegations of Paragraph I.

II.

Defendant admits the allegations of Paragraphs II and III.

III.

Answering Paragraphs IV, V, VI, VII, VIII, IX, X, XI and XII defendant lacks information as to the truth or falsity of the allegations therein contained and therefore denies the same and puts plaintiffs to proof thereon.

Wherefore, defendant, having fully answered plaintiffs' complaint herein, prays that the same be dismissed and that defendant recover his costs and disbursements herein incurred.

HENRY L. HESS,
United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

[Endorsed]: Filed February 18, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

The Attorney General of the United States, by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, moves the Court for an order dismissing the above-entitled case upon the ground and for the reason that the complaint herein, on its face, shows that applications for passports have not been denied plaintiffs and therefore plaintiffs have not been denied any rights on their alleged claim of citizenship, a jurisdictional requirement under Title 8, Section 903, U.S.C.

Dated at Portland, Oregon, this 6th day of April, 1953.

HENRY L. HESS,
United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

[Endorsed]: Filed April 6, 1953.

In the District Court of the United States
for the District of Oregon

Civ. 6622

WOO CHIN CHEW, by His Next Friend, WOO YUEN PAK,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6751

JOONG TUNG YEAU, by His Brother and Next Friend, JOONG YUEN HING,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6752

LEE WING GUE, by His Father and Next Friend, LEE SUN YUE,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend, LEE BEN KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6762

LOUIE HOY GAY, by His Father and Next Friend, LOUIE FOO,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6763

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

MEMORANDUM OPINION

May 25, 1953

James Alger Fee, Chief Judge:

In each of these cases, it has been represented that the petitioner is a resident of China who has never been in the United States and who claims citizenship by birth in a foreign country through his father, who is claimed to be a citizen of the United States. The history of the Chinese cases which have been administratively handled with appeal to the appellate courts of the federal system convinces the Court that the statute under which these cases were brought was not intended as a substitute for the administrative hearing by experts, which has been used for half a century. The danger of fraud in these cases has been apparent during that time, and, with the present disturbed political situation in China, which also affects the world, it is the opinion of the Court that the State Department should not be required to bring these persons into the country and release them for the purpose of trying out the question of their citizenship in the courts.

Aside from that point, however, in these cases the proceeding was originally brought against Dean G. Acheson, as Secretary of State, and in each a motion has been made to substitute John Foster Dulles. The Court is of opinion that the new Secretary of State should have an opportunity to have these questions passed upon originally by his administrative staff, and thereafter, if this statute is ap-

plicable, the actions could be filed again. The Court therefore finds that the plaintiffs have not shown that there is a substantial need for continuing the within actions against John Foster Dulles, successor to Dean G. Acheson, or that the former adopt or continue or threaten to adopt or continue the action of his predecessor. In view of the fact that substitution cannot be made, the Court dismisses each of these causes.

The last case differs from the others in that no motion for substitution has been filed. The same considerations apply. But, under the circumstances, it is dismissed for failure to prosecute.

[Endorsed]: Filed June 1, 1953.

In the United States District Court
for the District of Oregon

Civil No. 6763

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Plaintiffs,

vs.

DEAN ACHESON, Secretary of State of the United States of America,

Defendant.

ORDER

This matter came on to be heard before the undersigned Judge on Monday, April 20, 1953, upon mo-

tion of defendant by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order dismissing the above-entitled case upon the ground and for the reason that the complaint on its face shows that application for passport had not been denied plaintiffs and therefore plaintiffs have not been denied any rights on their alleged claim of citizenship, a jurisdictional requirement under Title 8, Section 903, U.S.C.A.; further, it having been stated into the record by plaintiffs' counsel that the plaintiffs have never resided in the United States; and it further appearing that plaintiffs have not filed a motion in the within cause for an order to substitute John Foster Dulles, Secretary of State of the United States of America, as party defendant in place of Dean Acheson, formerly the Secretary of State of the United States of America; and the Court having considered the record herein, statements of counsel, James P. Powers, of attorneys for plaintiffs, and Victor E. Harr, Assistant United States Attorney, of attorneys for defendant, and being of the opinion that Congress, in enacting Section 903, Title 8, U.S.C.A., never intended said section to be applicable to the claims of the nature herein asserted by plaintiffs, and being advised in the premises, it is

Ordered that defendant's motion be and the same is hereby allowed, and

It Is Further Ordered that the within cause be and the same is hereby dismissed for the following reasons:

1. That the application as made to the American Consulate Officer of the Department of State by plaintiffs to permit plaintiffs' entry into the United States has never been denied plaintiffs;

2. That plaintiffs have failed to file a motion to accomplish substitution of John Foster Dulles, Secretary of State of the United States of America, as party defendant in place of Dean Acheson, in accordance with Rule 25(d), Federal Rules of Civil Procedure;

3. That plaintiffs have never resided in the United States; and

4. That the Congress in enacting Section 903, Title 8, U.S.C.A., never intended that individuals asserting claims such as that asserted by plaintiffs herein, who have lived their lives as Chinese and who have never been in the United States, have the status and right to avail themselves of Section 903, Title 8, U.S.C.A.

Made and entered this 18th day of June, 1953.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed June 18, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Chin Chuck Ming and Chin Chuck Sang, by their next friend and father, Chin Ah Poy, plaintiffs above named, hereby, appeal to the United States Court of Appeals for the Ninth Circuit from the order dismissing the above-entitled case, entered in this action on June 18, 1953.

JOSEPH & POWERS,

By /s/ JAMES P. POWERS,

Attorneys for Plaintiffs.

[Endorsed]: Filed July 1, 1953.

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men by These Presents, That we, Chin Chuck Ming and Chin Chuck Sang, by their next friend and father, Chin Ah Poy, Plaintiffs, as Principal, and the American Surety Company of New York, as Surety, are held and firmly bound unto Dean Acheson, Secretary of State of the United States of America, Defendant, his executors, administrators, or assigns, in the sum of Two Hundrew Fifty & No/100 ($250.00) dollars, lawful money of the United States of America, to be paid unto the said Dean Acheson, Secretary of State of

the United States of America, his executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of June, A.D. 1953.

Whereas, the above-named Chin Ah Poy heretofore is a citizen of the State of Oregon commenced an action in the United States District Court, in and for the District of Oregon, against the said Dean Acheson, Secretary of State of the United States of America.

Now, Therefore, the Condition of This Obligation is such that if the above-named Chin Chuck Ming and Chin Chuck Sang, by their next friend and father, Chin Ah Poy, in the said action shall pay on demand, all costs that may be adjudged, or awarded against them as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

/s/ CHIN AH POY.

[Seal] AMERICAN SURETY COMPANY OF NEW YORK.

By /s/ JEAN D. SAUNDERS,
Res. Vice President.

Attest:

/s/ JEANNE SIEBEN,
Res. Asst. Secretary.

Sealed and delivered in the presence of:

.....

Countersigned:

E. MURRAY,
Resident Agent for Oregon.

[Endorsed]: Filed July 1, 1953.

United States District Court, District of Oregon

No. Civil 6751

(Also: Civil Nos. 6763, 6757, 6761 and 6762)

JOONG TUNG YEAU,

Plaintiff,

vs.

DEAN ACHESON, etc.,

Defendant.

April 20, 1953

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

RODNEY W. BANKS,
Of Counsel for Plaintiffs in Civil Nos. 6751, 6757 and 6762.

JAMES P. POWERS,
Of Counsel for Plaintiff in Civil No. 6753.

No appearance was made in Civil No. 6761.

VICTOR E. HARR,
Assistant United States Attorney,
Of Counsel for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Harr: As your Honor perhaps knows, these cases may be all considered together. They arise because of Title 8, Section 903 of the Code, that a person born of parents either one or the other residing in this country, their offspring born in a foreign nation may appear before the American Consulate and make application for a passport to this country by virtue of derivative citizenship. That has been the procedure. There have been a number of cases filed up and down the Coast, and quite a number of them here, where an alleged Chinese father, a citizen of this country, has returned to China, has married and they have had offspring.

The Court: They always have boys, I understand.

Mr. Harr: That is generally the rule, your Honor. And they then make application to the American Consulate, at the nearest office, and ask for a travel document. That is the basis of these five cases now before your Honor.

I would like to preface my statement, your Honor, with this comment: That as to each of these five cases we have not received the Department of State file. The motion is predicated entirely upon the complaint as filed by the plaintiff.

Section 903 provides that if any person who claims a right or privilege as a national of the United States is denied such right and privilege he may file suit in the Federal District Court applying for citizenship, for an order of citizenship. The complaints in each of these five cases state that such applications were made to the Secretary of State Consul either at Canton, China, or Hongkong. And all the complaints further state that there was no rejection of the [2*] travel document, but that the Consulate officer, for reasons of his own, was dilatory and did not act upon the matter, and therefore they have the right to have the Court determine that they are citizens.

Now, I don't believe that they meet the test. I think in one instance the allegation is that an application was made in August of 1947 to the American Consul at Canton, China, and that the application was later transferred, at a later date, to Hongkong. Now, it would seem that they are rather old cases. I am not in possession of facts to explain why that delay. In another case an application was made at Hongkong in March of 1952, and they say that the Consulate officer should have acted upon it; in another case, February, 1952; another in July, 1952; and another one in September of 1951.

But I contend this, your Honor, and my motion is based upon Section 903 of the Code, that the Court has no jurisdiction to entertain these suits because there has been no denial by the Consulate officer.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Banks: If the Court please, I presume your Honor is familiar with Section 903 of the Nationality Act, which states that if any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency or executive officer thereof upon the ground that he is not a national of the United States, such [3] person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department of the United States for the District of Columbia or in the District Court of the United States for the District in which such person claims a permanent residence, for a judgment declaring him to be a national of the United States.

In two of these cases the application was made in Canton or Hongkong in the years 1947 and 1948. The Consul has allowed an unreasonable delay of all this time, and has never acted directly or indirectly on this, which we feel is a direct refusal to issue the certificate of identity to enable the son to come over here to be heard in his trial. They might have long gray beards before the Consul would act over there, and we feel that they have a right to have their cases heard here upon the merits, and if it is proved that they are sons of these citizens they are American citizens. Their rights are being jeopardized because of the Consul's failure to act for, in several of these, a period of four or five years, there has been no word heard from them.

I don't believe Counsel has cited any cases di-

rectly in point. We have some cases that indicate that this dilatory action on the part of the Consul amounts to a denial. If your Honor cares to hear some of those cases—they are not directly in point, but they do indicate that the Consul must take some action within—— [4]

The Court: You agree that the method that has been used in absentia has been that of following the administrative procedure first?

Mr. Banks: Since 1940, since this act, you mean, your Honor?

The Court: No, I mean for 50 years before that.

Mr. Banks: I am not too familiar with how they operated before.

The Court: I am.

Mr. Banks: That is, before the act.

The Court: I am. I don't think that they intended to change that myself. I think that these proceedings are supposed to go through the administrative boards here and then go to the Court of Appeals. That is the normal course, and has been ever since I can remember.

Mr. Banks: I know most of the cases have been in San Francisco and Seattle. There have just been a few here. Since 1940 it seems that the Courts have entertained these cases under this section.

The Court: I never have. I don't know of any binding authority. There is no authority in the Ninth Circuit.

Mr. Banks: Except the wording of this Section 903, whatever interpretation might be placed on it.

The Court: Yes. But that is what I say, I think

the procedure has always been otherwise. I don't think that the act [5] was intended to change the procedure myself.

Mr. Banks: I guess there have been several hundred cases filed under it, and several cases appealed under this section, too. But I don't believe that question has ever come up on them.

The Court: Most of the cases that have been appealed have been the Japanese cases, which is an entirely different situation, as I understand it.

Mr. Banks: I can't answer that. It is according to how the Court's view of this section is.

The Court: As I say, I don't see any reason to reverse the procedure, and I don't think that this was intended to give the Court that right.

Mr. Banks: Of course, I don't want to argue with your Honor. It just says in the section——

The Court: You don't know the history.

Mr. Banks: Possibly not.

The Court: That is what I said. I know the history for 50 years. It has been a different type of procedure. It seems to me that if Congress wanted to change that Congress would have said so.

Mr. Banks: I don't know the history, but I just know this section, and it seems to me that this section would be clear as to what a person's rights would be under that situation.

The Court: You admit there is no denial? [6]

Mr. Banks: No official denial. But they have waited for four and five years. We feel that that is tantamount to a denial.

The Court: I don't see that, either. And at the

present time you have not made any motion to substitute somebody for Acheson?

Mr. Banks: Yes, I did, your Honor. It probably is not in the file, but I did that last week.

The Court: All right. I think that that is a better ground to go on than the other, because, as I understand it, in that you have to indicate that there is a proper ground, and that is why I think I will deny the motions and dismiss the cases on that ground.

Mr. Banks: Dismiss the case on the substitution, you mean?

The Court: Yes, on the ground that substitution cannot be made at present under the statute.

Mr. Banks: I have an associate here that might wish to say something. He has a case.

Mr. Powers: Your Honor, I don't believe that there is anything I could add. Our procedure was under this Section 903, which we contend allows anybody whose rights as an American citizen have been denied by in this case the Consul abroad to bring this action. Our theory in this particular case is that even though there has been no official denial by the Consul, he has refused to act at all, or at least has not acted at all [7] for an unreasonable length of time, and therefore that is tantamount to a denial of the rights of these plaintiffs. And under the section of the Code that is involved here they have a right to bring a case in the District Court where they claim permanent residence, which has been done in this case. It seems to me that if the statute is going to be construed to mean that that denial has to be an official denial, the Consul by

simply refusing to decide any particular case would absolutely make this section of the Code a nullity and no proceeding could ever be brought under it. That is the position in the case which I represent, which is only one of the cases.

The Court: Has your man ever been in the United States?

Mr. Powers: You mean the sons? No, they never have, your Honor.

The Court: How can he claim residence?

Mr. Powers: Through the father, your Honor. His father is a resident here.

The Court: I don't think that this section was ever intended for that sort of a maneuver. I don't think he has any residence here.

Mr. Powers: All we are attempting to do, your Honor, is get a judicial trial so that the Court can determine the question.

The Court: I know, but he has never been here. How can he be a resident? [8]

Mr. Powers: I believe he is entitled to claim a residence in this country. Being a minor it would be through his father.

The Court: Not if he never has been here.

Mr. Harr: There was a recent case, your Honor —perhaps your Honor has read it. I think it was decided in January by Judge Goodman. He comments along the lines your Honor has commented, that in his opinion Section 903 was never intended to cover situations of this kind. He stated that it was his opinion that 903 was intended to cover those cases where people had perhaps expatriated them-

selves by some conduct. And you will note that 903 follows Sections 901 and 902, and 901 and 902 cover such instances as people living abroad who have lost their citizenship. Those were people who had already had citizenship, and this was a procedure set up by Congress to deal with those cases rather than with these foreign-born people.

Mr. Powers: That is all I can say on the subject, your Honor.

The Court: In each of these cases have motions to substitute been filed?

Mr. Banks: Yes, your Honor.

Mr. Powers: I don't believe that is true in my case. No, it has not in my case.

Mr. Harr: I believe just in those cases that Mr. Banks represents have motions been filed.

The Court: In any one of these cases has the person ever [9] been in the United States? In any of your cases?

Mr. Banks: No, your Honor.

Mr. Harr: I notice there is one more case, and I wasn't aware of this when I first addressed the Court. Mr. Maurice Corcoran is attorney in one of the cases here. I thought Mr. Banks represented them all, but I see Mr. Corcoran is the attorney in the Chee case. I don't believe he is in court.

The Court: What is your case? Is that the Ming case?

Mr. Powers: That is the Ming case, 6753, your Honor.

Mr. Harr: I believe Maurice Corcoran is in 6761, Chee.

The Court: In 6751, Yeau vs. Acheson, 6757, Toy vs. Acheson, and 6762, Gay vs. Acheson, the motions to substitute are denied, and in each case the case is dismissed because the statutory requirement of a motion to substitute cannot be performed, it having been stated in the record that the plaintiff has never been a resident of the United States.

In the Ming case, there being no motion to substitute, the cause is dismissed for failure to file such a motion to substitute, and likewise it is dismissed upon the ground set out in the motion, it being admitted in this record that Ming has never been actually within the limits of the United States.

The Chee case is dismissed for failure to prosecute.

(Whereupon proceedings in the above matters on said day were concluded.)

Certified: A true transcript.

/s/ JOHN F. BECKWITH,
Official Reporter.

[Endorsed]: Filed June 10, 1953. [10]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Defendant's motion to dismiss; Memorandum opinion; Order dated June 18, 1953; Notice of appeal; Bond on appeal; Designation of contents of record on appeal, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6763, in which Chin Chuck Ming and Chin Chuck Sang, by their next friend and father, Chin Ah Poy, are the plaintiffs and appellants and Dean Acheson, Secretary of State of the United States of America, is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is also enclosed a transcript of proceedings, April 20, 1953; and that the cost of filing the notice of appeal is $5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 6th day of August, 1953.

[Seal] F. L. BUCK,
Acting Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 13,963. United States Court of Appeals for the Ninth Circuit. Chin Chuck Ming and Chin Chuck Sang, by Their Next Friend and Father, Chin Ah Poy, Appellants, vs. John Foster Dulles, Secretary of State of the United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 8, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term, 1952, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twenty-ninth day of July, in the year of our Lord one thousand nine hundred and fifty-three.

Present: William Healy, Circuit Judge, Presiding;
Homer T. Bone, Circuit Judge;
William E. Orr, Circuit Judge.

No. 13963

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Appellants,

vs.

DEAN ACHESON, Secretary of State of the United States of America,

Appellee.

ORDER GRANTING MOTION TO SUBSTITUTE PARTY APPELLEE

Upon consideration of the motion of appellants for an order substituting John Foster Dulles, Secretary of State of the United States of America, as party appellee in place and stead of Dean Acheson, and of the opposition of appellee thereto, and by direction of the Court,

It Is Ordered that the said motion for substitution be, and hereby is granted, and that John Foster

Dulles, Secretary of State of the United States of America, be, and he hereby is, substituted as appellee in the place and stead of Dean Acheson, and that this action be continued in his name as appellee.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

In this appeal, Appellants intend to rely on the following points:

1. That the trial court erred in dismissing the within cause on the ground that the officer of the Department of State has never denied Appellants' application for entry into the United States, in that Appellants' complaint sets forth facts showing that said officer has unfairly, unreasonably and arbitrarily failed to act on their application, and such failure is tantamount to a denial under Section 903, Title 8, U.S.C.A.

2. That the trial court erred in dismissing the within cause on the ground that no motion had been made to substitute the present Secretary of State of the United States of America in place of the one acting at the time the cause was instituted, in accordance with Rule 25(d), Federal Rules of Civil Procedure, in that the six months' period, provided for in said Rules to make said substitution after the retirement from office of the original defendant, had not expired at the time of the dismissal of the action, and that timely substitution was made in the above-entitled court.

3. That the court erred in dismissing said cause on the grounds that Appellants have never resided in the United States of America in that under said Section 903 residence in the United States is not a requirement for bringing said action.

4. That the trial court erred in dismissing said cause on the grounds that said Section 903 did not apply to individuals in the Appellants' situation, having never been in the United States, in that said Section 903 does not limit the right to bring an action thereunder to persons who have lived in the United States of America.

JOSEPH & POWERS,

By /s/ JAMES P. POWERS,

Attorneys for Plaintiffs-Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed August 14, 1953.

Nos. 13963, 14030, 14031, 14032, 14033, 14034

United States
COURT OF APPEALS
for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

RODNEY W. BANKS,
Public Service Building,
Portland, Oregon,
JOSEPH & POWERS,
Yeon Building,
Portland, Oregon,
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-53

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Nos. 13963, 14030, 14031, 14032, 14033, 14034

United States
COURT OF APPEALS
for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

Appellants, in each of these cases, filed their complaints to be declared nationals and/or citizens of the United States under the provisions of Sec. 503 of the Nationality Act of 1940 (Title 8, U.S.C.A., Sec. 903) in the United States District Court for the District of Oregon. Their complaints were dismissed by order of Dis-

trict Judge James Alger Fee on June 18, 1953 (Tr. 16). Notices of appeal were duly filed with the Clerk of this Court and consolidation of all cases was ordered by this Court, upon stipulation of all counsel (Tr. 38-41).

Jurisdiction of the District Court to entertain the complaints of appellants, declaring them to be nationals and/or citizens of the United States, is conferred by Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, (Title 8, U.S.C.A., Sec. 903) and Sec. 1343 of Title 28, U.S.C.A. Jurisdiction of the Court of Appeals to review the District Court's final orders is conferred by Sec. 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The orders of the District Court in dismissing the complaints of appellants for judgments, declaring them to be nationals and/or citizens of the United States, are final decisions within the meaning of Sec. 128 of the Judicial Code.

These cases all come within the meaning and interpretation of Sec. 503, and we quote said section:

> "JUDICIAL PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONALS; CERTIFICATE OF IDENTITY PENDING JUDGMENT.
>
> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia

or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have initiated such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, Sec. 503, 54 Stat. 1171."

STATEMENT OF THE CASE

Appellants, six in all, filed their complaints in the District Court of the United States for the District of Oregon for declaratory judgments under Sec. 503 of the Nationality Act of 1940 (quoted above). Their complaints are similar in all respects to the complaint shown herein (Tr. 3-7) and in substance are as follows:

1. That appellants were born in China and are true and lawful blood sons of their fathers, who are citizens of the United States.

2. That said complaints contain statistical data covering the parents' marriage and dates and places of birth of appellants herein.

3. That the appellants are citizens of the United States and claim permanent residence within the jurisdiction of the District Court.

4. That appellants filed applications for passports or travel documents with the American Consulate General in Hong Kong in order that they would be eligible to purchase transportation to the United States in order to apply for admission as citizens thereof at a port of entry under the immigration laws; that the American Consulate General has refused documentation for more than six months in some cases to more than several years in others, as shown on the face of the various individual complaints; that such conduct by the American Consulate General is a denial of a right or privilege of a United States national.

5. That the Americal Consulate General in Hong Kong is an official executive of the Department of State, and that as such, has denied appellants the right to proceed to the United States, which is a denial of a right or privilege of a United States national.

6. That the proceedings are filed under Sec. 503 of the Nationality Act of 1940 (8 U.S.C.A., 903).

7. That appellants claim United States nationality and citizenship in good faith and on a substantial basis, and are entitled to be declared a national of the United States.

All complaints conclude with a prayer asking the Court to find appellants to be nationals of the United States.

The only exceptions differentiating the cases are:

1. That in case No. 14030, *Woo Chin Chew vs. Acheson,* the American Consulate General at Hong Kong officially denied appellants' application for passport or travel document to the United States.

2. That in case No. 13963, *Ming vs. Dulles,* this Court has ordered substitution of John Foster Dulles, Secretary of State for the United States, as defendant, in place of Dean G. Acheson.

3. That the time elapsing between the filing of applications for passports or travel documents and the time of filing their complaints vary with each appellant, as shown by the face of the complaint in each of the cases, but all lapses are over six months and up to and including several years.

Notices to dismiss the complaints were filed in each of these cases on behalf of the Attorney General of the United States (Tr. p. 9) on the ground that appellants' complaints, on their face, show that applications for passports have not been denied the appellants, and that, therefore, appellants have not been denied any rights.

Appellants filed timely motions, supported by affidavits, to substitute John Foster Dulles, Secretary of State for the United States, in place of Dean G. Acheson (Tr. 10-11).

Hearings were had on the motions to dismiss appellants' complaints (Tr. 21) (Tr. 31), and on motion of appellants to substitute (Tr. 10-11), and opinion rendered by the District Court (Tr. 14) and orders of dismissal followed said hearings (Tr. 16). This appeal results.

SPECIFICATION OF ERROR

Appellants respectfully contend that the District Court erred in:

1. Denying appellants' motions to substitute John Foster Dulles, Secretary of State of the United States, as party defendant for and in place of Dean G. Acheson.

2. Dismising the cases on the ground that the Department of State, through its consulate officer, has never denied appellants' applications for entry into the United States.

3. Dismissing the cases on the ground that appellants had never resided in the United States of America.

4. Dismissing said cases on the ground that Sec. 903, Title 8, U.S.C.A. never intended that individuals asserting claims such as that asserted by the appellants herein, who had lived their lives as Chinese and who had never resided in the United States, have the status to avail themselves of Sec. 903, Title 8, U.S.C.A.

SUMMARY OF ARGUMENT

1. Appellants duly and timely filed their motions, supported by affidavits (Tr. 10-12) for the substitution of John Foster Dulles for Dean G. Acheson within six months after John Foster Dulles took office as Secretary of State of the United States, and have complied with Rule 25-D of the Federal Rules of Civil Procedure. Both motions and affidavits have alleged that there is substantial need for continuing and maintaining these actions, and that John Foster Dulles had not indicated any change in ruling or attitude concerning the relief prayed for in appellants' complaints from that of his predecessor, Dean G. Acheson. Reference is made to District Judge Fee's Memorandum Opinion (Tr. 15). This court has made a practice of allowing similar motions.

2. Appellants have filed applications for documentation with the American Consulate General at Hong Kong, indicating their desire and intention to proceed to and take up permanent residence in the United States. The American Consulate General, an executive official of the Department herein, refused, and has refused as of this date, to issue to appellants any form of documen-

tation which would permit them to proceed to the United States to have their nationality determined by the Immigration and Naturalization Service. Appellants contend that this delay on the part of the American Consulate General at Hong Kong to act upon their applications for a travel document or passport is tantamount to a denial.

Look Yun Lin vs. Acheson, 95 Fed. Sup. 583.
Lee Bang Hong vs. Acheson, 110 Fed. Sup. 48.
Lee Mun Way vs. Acheson, 110 Fed. Sup. 60.
Yee King Gee vs. Acheson, 184 Fed. 2d 382.

It is also the contention of appellants that the District Court is given original jurisdiction to determine the nationality status of appellants to nationality, and that their actions under Sec. 503 are independent judicial proceedings are not review trials de novo.

3. For the sake of brevity, specifications of error 3 and 4 will be discussed together, inasmuch as they challenge the jurisdiction of the court to entertain these cases. Sec. 503 in its wording provides that actions may be brought thereunder by those, such as appellants herein, who have never been in the United States. Federal Courts have jurisdiction of cases similar to appellants' herein and are amply supported by a long line of cases where the Federal Courts have exercised their jurisdiction to adjudicate the rights or claims of nationals.

Acheson vs. Yee King Gee, 9 Cir., 184 Fed. 2d 382.
Attorney General vs. Ricketts, 9 Cir., 165 Fed. 2d 193.

Podeau vs. Acheson, 3 Cir., 170 Fed. 2d 306
Bauer vs. Clark, 7 Cir., 161 Fed. 2d 397.
Brassert vs. Biddle, 2 Cir., 148 Fed. 2d 134.
Look Yun Lin vs. Acheson, 87 Fed. Supp. 463.

ARGUMENT

1. The motions, supported by affidavits, for substitution of John Foster Dulles for Dean G. Acheson were arbitarily denied by the District Court, although specifications of Rule 25-D of the Federal Rules of Civil Procedure were complied with. When the motions for dismissal were heard by the District Court covering these cases, motions to substitute John Foster Dulles for Acheson had been filed in all cases but Case No. 13963, *Chin Chuck Ming vs. Dulles,* herein included in this appeal. The District Court denied the motion to substitute in all cases herein where motions to substitute had been filed and dismissed the *Ming* case, No. 13963, for failure to file such motion (Tr. 29-30). The *Ming* case, No. 13963, was, therefore, appealed to the United States Court of Appeals for the Ninth Circuit, and a motion to substitute John Foster Dulles for Dean G. Acheson was made in said case in the Appellate Court, and the Appellate Court properly allowed said motion and substituted John Foster Dulles for Dean G. Acheson (Tr. of Record in Case No. 13963, p. 30). The District Court was, therefore, in error in his rulings on substitution of defendant Dulles for Acheson, and similar rulings on substitution of defendants should be made by this Court as has been done in the *Ming* case, No. 13963, herein included in this appeal.

2. Further ground for dismissal of these suits is set forth in (Tr. p. 17); that the complaint on its face shows that appellants' applications for passports had not been denied them. All of appellants herein filed their applications for passports and/or travel documents more than six months before filing their complaints herein. How long should appellants wait for the Consul to act? Appellants contend that the dilatory action on the part of the Consul is tantamount to a denial of their applications. The appellants' complaints set forth the rights of the appellants, and the duty of the Consul, and a breach of the duty by the American Consulate by failing, denying or refusing to comply with the rights and privileges appurtenant to the appellants as United States nationalists. The maxim "Justice delayed is justice denied" holds true in these instances. This principal was involved in the case of *Nuspel vs. Clark,* 83 Fed. Sup. 963, as well as Look Yun Lin vs. Acheson, 95 Fed. Sup. 583, wherein the Court states:

> "When alleged citizen detained in China applied in 1946 for documentation as a citizen with American Consul, and claim was referred in 1950 to Washington after exhaustive attempts to secure a certificate of identity on the consulate level, and a delayed citizens' counsel had complied with federal regulations, and the state department had failed to act on the application for eight months, alleged citizen had exhausted her administrative remedies and would be granted certificate of identity to proceed to the United States to attend a court hearing to establish her citizenship." Nationality Act of 1940, Sec. 503, U.S.C.A., Sec. 903.

The appellants, by filing an application for documentation with the American Consulate General at

Hong Kong, indicated their desire and intention to proceed to and take up permanent residence in the United States. The American Consulate General, an official executive of the defendant herein, refused, and has refused as of this date, to issue to these applicants any form of documentation which would permit them to proceed to the United States.

Section 224 of Title 22, U.S.C. makes it unlawful when the United States as at war or during the existence of a national emergency proclaimed by the President for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless such person is in possession of a Unitted States passport. Section 225 of Title 22, U.S.C.A. prescribes a criminal penalty against the person involved or the transportation carrier for violation of Section 224. These sections have been continued in effect by subsequent legislation despite the President's proclamation of April 28, 1952, terminating the national emergency proclaimed May 27, 1941. See Public Law 450, 82nd Congress, Second Session, passed July 7, 1952.

Under the practice in effect at the time of filing of these complaints, the Foreign Service in China—if it were favorably disposed—granted to an applicant such as these appellants, in lieu of a United States passport, a document identified as a "travel affidavit". This document contained a recitation of the party's desire to proceed to the United States and have his nationality determined by the United States Immigration and Naturalization Service. Even though there was no specific regulation governing its issuance, possession of such

"travel affidavit" was construed as compliance with the passport requirements. Under this procedural system, the persons granted such documentation were permitted to proceed to a port of entry of the United States for the purpose of having their claims established by the administrative agency charged with such duty. Of course those denied documentation were likewise denied the right to proceed to a port of entry for the purpose of having their admissibility determined. At the time these actions were filed, the Department of Sstat had no statutory authority to make a determination of United States nationality.

Measured by any reasonable standard of conduct, this record establishes that these appellants have been denied their rights as nationals to travel to the United States. This Court, as previously stated, is given original jurisdiction to determine the nationality status of the claimant to nationality. It does not review the determination of the American Consulate. Had the Consulate granted these appellants' applications for a passport or travel document, these appellants would have proceeded to a port of entry, there made their applications for nationality determination by the proper administrative governmental agency—the Immigration and Naturalization Service. But the Consulate has elected not to grant these appellants' requests, and these appellants had no course to follow as nationals but to institute their actions under Section 503 while outside the territorial limits of the United States.

The action under Section 503 is an independent judicial proceeding, and is *not a review trial de novo.*

In *Wong Wing Foo vs. McGrath,* 196 F. 2d 120, the Court had occasion to consider this question in the course of determining the admissibility of evidence. The Court said, at page 121:

> "Plaintiff here centends that the district court erred in not treating the instant Sec. 903 proceeding as an independent action, but instead as a review of the special board of special inquiry proceedings in which the evidence taken before that board was considered with other evidence taken before the district court. That is to say, the court below regarded the Sec. 903 proceeding as though it were a review trial de novo. We can find nothing in the language of Sec. 903 warranting treating the action there provided *as anything other than an independ ent action which plaintiff could have brought as soon as the immigration owcials refused to accept his passport and to allow him to enter.* Such an action brought at once could not have its independent character changed by a subsequent administrative proceeding under Sec. 153." (Emphasis supplied.)

Then after quoting the statute (Section 503 of the Nationality Act of 1940, referred to in the opinion as Section 903, 8 U.S.C.A.), the Court continued:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' is to succeed some prior administrative proceeding. This acton is largely invoked where there has been no administrative proceedings at all. Such is the case where the Department of State refuses to give a passport. Perkins vs. Elg, 307 U.S. 325; Podea vs. Acheson, 179 F. 2d 306 (Cir. 2); or where a consul refuses to register a person as a United States national Acheson vs. Mariko Kuniyuki, 189 F. 2d 741 (Cir. 9); or refuses to allow a person claiming American citizenship to come to this country, Acheson vs. Yee King Gee, 184 F. 2d

382 (Cir. 9); or where American citizens acting under claimed duress have filed woth the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside. McGrath vs. Tadayasu Abo, 186 F. 2d 766 (Cir. 9). In none of the above cases is the Sec. 903 action a trial de novo. *There has not been anything tried by the Department of State or of Justice to be tried again as on appeal or review.*" (Emphasis supplied.)

Does the District Court say that it may not entertain the present action unless and until the American Consulate at Hong Kong elects to speak? Does the District Court suggest that it is powerless to grant relief to appellants so long as the Consulate takes refuge behind a wall of silence?

"Justice delayed is justice denied" is a historic maxim of our law. It was aptly applied by the Court in *Nuspel vs. Clark,* 83 F. Supp. 963, which was a Section 503 action brought to secure an immigration visa for plaintiff's wife. The Secretary of State had held the application in abeyance, pending the ultimate determination of plaintiff's status. The Court said, at page 965:

> "Counsel for the defendants assert that this 'holding in abeyance' does not constitute a denial of such rights or privileges. It seems, however, that the failure to grant the visa for plaintiff's wife within a reasonable time *constitutes a denial of such application equally as much as justice delayed is justice denied.*" (Emphasis supplied.)

Finally, we respectfully direct the Court's attention to the plain language of Section 503. Nowhere in that statute is there any statement that the denial of a national's rights or privileges must be accomplished in a particular manner before the Court can entertain the

action. The statutory requirements are met if the national's rights or privileges are denied. That denial may result from any one of many acts or omissions of any "department or agency, or executive official thereof." We respectfully challenge defendant to point to any authority in the statute which supports his position that this Court cannot act until the American Consulate has chosen to act upon an application for travel documents.

3. Other ground for the District Court's dismissal of appellants' complaints is that appellants have never resided in the United States (Tr. p. 18), and as such, cannot maintain their actions under Section 903, and that Congress never intended that claims, such as asserted by appellants herein, who had lived their lives as Chinese and who had never been in the United States, have the status to avail themselves of said section. There is nothing in the reading of Section 503 that states that appellants must reside in the United States before filing their actions. These contentions of the District Court challenge the jurisdiction of said court. The District Court erred in dismissing these actions on these grounds, as hereinafter shown.

Section 1343 of Title 28, United States Code Annotated, provides that the United States District Courts shall have original jurisdiction in matters which affect the rights or privileges of citizens of the United States.

In the instant cases, these appellants expressly bring their respective actions under Section 503 on the Nationality Act of 1940 (8 U.S.C.A. 903). Defendant does not urge or the District Court does not say that the

complaints are not brought in good faith. As a general rule, if the allegations of the complaints in good faith make a claim within the jurisdiction of the Court, the Court has jurisdiction, regardless of whether or not the claim is well founded. *Utah Fuel Co. vs. National Bituminous Coal Comm.,* 306 U.S. 56, 59 S. Ct. 409.

The District Court has obscured the distiction between the issue of jurisdiction and that of the merits of the case. That distinction was precisely stated by the Supreme Court in *Binderup vs. Pathe Exchange,* 68 L. Ed. 308, 314, 44 S. Ct. 96, 263 U.S. 291, at page 305, where the Court said:

> "Jurisdiction is the power to decide a justifiable controversy and includes question of law as well of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color or merit."

The fact that Federal Courts have jurisdiction is amply supported by a long line of cases where the Federal Court has exercised its jurisdiction to adjudicate the rights or claims of nationals.

> Acheson v. Yee King Gee, 9 Cir., 184 F. 2d 382.
> Podeau v. Acheson, 3 Cir., 170 F. 2d 306.

Attorney General v. Ricketts, 9 Cir., 165 F. 2d 193.

Bauer v. Clark, 7 Cir., 161 F. 2d 397.

Brassert v. Biddle, 2 Cir., 148 F. 2d 134.

Look Yun Lin v. Acheson, 87 F. Supp. 463.

In the case of *Acheson v. Yee King Gee,* supra, the Court of Appeals for the Ninth Circuit states:

> "Both below and here the Secretary has urged but two propositions, (1) that the district court was without jurisdiction to entertain the suit, and (2) * * *. We agree with the trial court that the Secretary is wrong on both counts."

Similar motions to dismiss on this ground, want of jurisdiction, were denied by the United States District Court at San Francisco, California, in the following cases:

Lee Shew v. McGrath, No. 29350.

Hong Yick Foo & Hong Yick Ming v. Acheson, No. 29428.

Toy Teung Kwong v. Acheson, No. 29877.

Wong Gan Chee v. Acheson, No. 29925.

Wong Yip Fong v. Acheson, No. 29945.

Jo Ting v. Acheson, No. 29948.

Heuy Hip v. Acheson, No. 30005.

Wong Ting Hin v. Acheson, No. 30006.

Hum Yet Shan v. Acheson, No. 30007.

Jo Ting v. Acheson, No. 30185.

Jee Ngen Sun v. Acheson, No. 30186.

Yee Kwock Shirn v. Acheson, No. 30278.

Chin Bing San v. Acheson, No. 30301.

Fong Sik Leung v. Acheson, No. 30318.

Lee Wot v. Acheson, No. 30345.

Camera v. Acheson, No. 30346.

Ow Yeong Yung v. Acheson, No. 30361.

The Honorable Michael L. Igoe, United States District Court at Chicago, Illinois, in the case of *Lee Wing Hong, et al. v. Dulles,* 51-C-1920, in his conclusions of law held:

> "This Court has jurisdiction under Section 503 of the Nationality Act of 1940 (8 USC 903) and under the Declaratory Judgement Act (28 USC 2201)."

Under the authorities above cited, it is respectfully submitted that this Court has jurisdiction of the parties and of the subject matter of the controversy in each of these cases, and is empowered and authorized under the Statute to adjudicate the claims of appellants to United States nationality and to grant the relief requested.

The basic considerations of the sufficiency of the complaint, when challenged by a defendant's motion to dismiss are well settled and not subject to dispute. It has sometimes inexactly been said that a motion to dismiss a complaint for failure to state a cause of action is a substitute for the former demurrer in an action at law or a motion to dismiss for want of equity in suits in equity. This is not an exact statement of the law since the new Rules of Federal Civil Procedure do not require that a complaint shall state facts sufficient to constitute a cause of action.

> Dennis v. Village of Tonka Bay, 8 Cir., 151 F. 2d 411, 412.
> Dioguardi v. Durning, 2 Cir., 138 F. 2d 774, 775.

In determining whether complaints state a claim on which relief can be granted, the test is whether in the light most favorable to plaintiff, together with those in-

ferences and legal conclusions reasonably issuing therefrom, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim.

Knox v. First Security Bank of Utah, 10 Cir., 196 F. 2d 112, 117.
Machado v. McGrath, DC, 183 F. 2d 706, 708.
Gruen Watch Co. v. Artists Alliance, 9 Cir., 191 F. 2d 700, 705.
Valle v. Stengel, 3 Cir., 176 F. 2d 697, 701.
Cool v. International Shoe Co., 8 Cir., 142 F. 2d 318.
Garbutt v. Blanding Mines Co., 10 Cir., 141 F. 2d 679.
Abel v. Munro, 2 Cir., 110 F. 2d 647.
U. S. v. Association of Am. RR., 4 P. R. 510.

A motion to dismiss on the ground that the petition does not state a claim upon which relief can be granted, admits all facts well pleaded.

Land v. Dollar, 330 U.S. 731, footnote 4, at page 735, 67 S. Ct. 1009, 81 L. Ed. 1209.
Polk v. Glover, 83 L. Ed. 6, 11, 305 U. S. 5, 59 S. Ct. 17.
Suckow Borax Mines Consol. v. Borax Consolidated, 9 Cir., 185 F. 2d 196, 205, Cert. denied 95 L. Ed. 680, rehearing denied 95 L. Ed. 1349.
Galbreath v. Metropolitan Trust Co., 10 Cir., 134 F. 2d 569, 570.
Warmsprings Irr. Dist. v. May, 9 Cir., 117 F. 2d 802, 805.
Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F. 2d 865, 867.

A complaint should not be dismissed on motion without a hearing on the merits unless it appears to be a certainty that the plaintiff would be entitled to no relief under any statement of facts which could be proved to support his claim.

Gruen Watch Co. v. Artists Alliance, 9 Cir., supra.
Chicago & N. W. R. Co. v. Chicago Package Fuel Co., 7 Cir., 183 F. 2d 630, 631.
Amer. Federation of Labor v. Western Union Tel. Co., 6 Cir., 179 F. 2d 535, 536.
U. S. v. Arkansas Power & Light Co., 8 Cir., 165 F. 2d 354, 357.
Dollar v. Land, 154 F. 2d 307, affirmed supra.
Ware v. Travelers Ins. Co., 9 Cir., 150 F. 2d 463, 465.

Motions to dismiss complaints should be granted sparingly and only where plaintiff cannot under any theory prove his case.

Reeser v. National League Club, 84 F. Supp. 947.

The allegations of the complaint will be liberally construed on a motion to dismiss for failure to state a claim on which relief can be granted.

Gulf Coast Western Oil Co. v. Trapp, 10 Cir., 165 F. 2d 343, 347.

Any doubt should be resolved against the moving party.

Hawkins v. Frick-Reid Supply Co., 5 Cir., 154 F. 2d 88, 89.

The Court of Appeals for the 8th Circuit in *Leimer v. State Mut. Life Assur. Co.,* 108 F. 2d 302, 305, stated:

> "Rule 12(b)(6) authorizes a motion to dismiss a complaint for 'failure to state a cause of action upon which relief may be granted', which motion takes the place of the former demurrer in an action at law or motion to dismiss a bill of complaint for want of equity. A demurer or motion to dismiss for want of equity admitted, for the purpose of the demurrer or motion, all facts well pleaded in the

> complaint. Under the present practice, we think, the making of a motion to dismiss for failure to state a claim upon which relief can be granted has the effect of admitting the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by the statute of limitations."

The Court continued by stating:

> "We think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

Also see:

> Dennis v. Village of Tonka Bay, supra.
> Karl Kiefer Mach. Co. v. United States Bottlers Machinery Co., 7 Cir., 113 F. 2d 356, 357.

In the light of the foregoing, it must be admitted that these appellants claim to be United States nationals; that they have each filed an application with the American Consulate General in Hong Kong for a United States passport or travel document in lieu thereof; that these appellants have openly expressed a desire to proceed to the United States, the country of their claimed nationality; that the American Consulate General has refused to provide these appellants with any form of documentation; that these appellants cannot

proceed to the United States due to the provisions of statutes now in full force and effect which require them to be in possession of such documents before seeking admission, and that they now seek a judicial determination of their claims of United States nationality. These are all allegations which are taken as true in the decisions of these cases. Here, appellants, nationals of the United States, have been deprived of their right to travel to the country of their claimed nationality. How can it be said that the appellants have not been deprived of any right or privilege as nationals of the United States? This record emphatically disclosed that appellants' rights as nationals have been grossly abused.

As was stated by the Court of Appeals in the *Leimer* case, supra, such a motion admits "the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder". If such motion admits the existence and validity of such claim, what is there for this Court to consider? Query, do these appellants have a right to assert in this Court a claim to United States nationality?

It is a fundamental and inherent right of a United States national to partake of the privileges granted to other members of the same class. It is a deprivation of "life" and "liberty" to deny a United States national the right to reside within the confines of the nation of his claimed nationality.

CONCLUSION

These actions have brought squarely within the provisions of Section 503 of the Nationality Act of 1940. Under it, this Court has jurisdiction to try the issues and to determine the appellants' claims to United States national status. By his conduct, an agent of the defendant has denied appellants' rights as nationals to proceed to the United States and take up permanent residence herein. Appellants' proceeding under the Statute seeks judicial relief from this denial and oppression. All these issues are simply and plainly set forth in the respective complaints. Certainly the complaints are sufficient to notify the defendant of the nature and basis of the action. This is especially true where the knowledge concerning the denial or rejection is a matter specifically known by the defendant. More than that, appellants are not required to do.

The District Court, in dismissing these cases, says, in effect, that appellants would not be entitled to relief even if appellants established all the allegations of the complaints. Such a conclusion defies the Statute.

On the pleadings, defendant has been guilty of a course of conduct which can be justified only if the Court should find that appellants, contrary to their respective claims, are not nationals of the United States. The truth or falsity of appellants' claims to nationality status is the core of the controversy before this Court.

When each of the complaints are viewed in the light most favorable, with all inferences and intendments, to

the appellants, and construed as to do substantial justice, there is no doubt that the pleadings are sufficient to meet the new Rules of Federal Civil Procedure.

It is asserted that the pleadings are sufficient to establish that the appellants have been denied a right or privilege upon that grounds that they are not nationals of the United States. If there is any slight omission, the Court normally bridges the natural gaps and sustains the pleadings whenever possible.

The pleadings presented here show that there is a justiciable controversy involving a Federal question arising under Federal Statute.

In view of the foregoing, it is respectfully submitted that under the Statute and the pleadings herein a reversal of the District Court's order dismissing these cases are in order.

Respectfully submitted,

RODNEY W. BANKS,
JOSEPH & POWERS,
Attorneys for Appellants.

Nos. 13963, 14031, 14032, 14033, 14034

In the United States Court of Appeals for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court for the District of Oregon

C. E. LUCKEY,
United States Attorney for the District of Oregon

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Joseph & Powers,
Attorneys for Appellants.

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On Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLEE

INTRODUCTORY STATEMENT

The appeal in this case and consolidated cases Nos. 13963, 14031, 14032, and 14034 are concerned with claims to United States nationality by Chinese who are not residents of the United States, founded upon alleged blood relation-

ship as children to fathers who are citizens of the United States.

STATEMENT OF THE CASE

The appellants herein claimed to be children of Lee Ben Koon, alleged to be their father and a citizen of the United States at the times of their respective births in China. Paragraphs VII and VIII of the complaint allege:

> "VII. That said Lee Ben Koon caused to be filed with the American Consul General at Hong Kong his affidavit—application, dated February 9, 1952, prepared in accordance with the regulation for a passport or travel document in behalf of the said Lee Gwain Toy and prepared a similar affidavit—application, dated March 17, 1952, in behalf of Lee Gwain Dok, in order that the plaintiffs would be eligible to purchase transportation to the United States in order to apply for admission as Citizens thereof at a port of entry under the Immigation Laws.
>
> "VIII. That although the plaintiffs have been interviewed by the said American Consulate at Hong Kong, no action has been taken by the said Consulate concerning the issuance of passports or travel documents and the plaintiffs believe and therefore allege that the said American Consulate has no intention of issuing to plaintiffs passports or travel documents, and that the said American Consulate's failure to issue such passports or travel documents constitutes an unreasonable and unfair delay and a denial of plaintiffs' rights as American Citizens, and plaintiffs have been thereby denied from coming to the United States and from

applying and presenting the proof of their Citizenship to the Immigration and Naturalization Service at a port of entry; that since the said American Consulate has refused to take any action as aforesaid, there has been no official denial of the plaintiff's petitions by the said American Consulate and, therefore, the defendant did and has refused to take cognizance of any appeal, and that the said American Consulate by their delaying tactics has prevented the plaintiffs from taking any action by appeal or otherwise, and the plaintiffs' only remedy is under Section 503 of the Nationality Act of 1940 for the reason that they can obtain no relief whatsoever from the said American Consulate."

Defendant filed its answer to plaintiffs' complaint and for lack of information denied all of the allegations contained in the foregoing paragraphs VII and VIII.

The pertinent parts of the complaints in the consolidated cases herein are set forth in Appendices A to D inclusive as follows:

Appendix A—Case No. 13963—Chin Chuck Ming and Chin Chuck Sang, by Their Next Friend and Father, Chin Ah Poy vs. John Foster Dulles, Secretary of State of the United States of America.

Appendix B—Case No. 14031—Joong Tung Yeau, by His Brother and Next Friend Joong Yuen Hing, vs. Dean Acheson, Secretary of State of the United States of America.

Appendix C—Case No. 14032—Lee Wing Gue, by His Father and Next Friend Lee Sun Yue vs. Dean

Acheson, Secretary of State of the United States of America.

Appendix D—Case No. 14034—Louie Hoy Gay, by His Father and Next Friend Louie Foo vs. Dean Acheson, Secretary of State of the United States of America.

Except as indicated above, there were no allegations that any of the appellants *had been denied such right or privilege* by a Department or Agency, or Executive Official thereof, *upon the ground that he or she was not a National of the United States,* a jurisdictional requirement.

SPECIFICATIONS OF ERROR

Appellants have made four specifications of error. The issues set forth in specifications 1, 3 and 4 have been disposed of in cases decided subsequent to the orders of dismissal entered in the within causes and the correctness of these specifications of error is admitted. Specification 2, however, raises a very important jurisdictional question.

> "2. That the trial court erred in dismissing the within cause on the ground that the Department of State, through its Consulate officer has never denied appellants' application for entry into the United States."

A separate transcript of record has been filed in Case No. 13963, *Chin Chuck Ming, etc.* vs. *Dulles,* setting forth four specifications of error of which specifications 2, 3 and 4 are no longer material to this appeal in that decisions

rendered subsequent to the filing of this appeal have rendered the questions therein presented moot. Specification of error 1, similar in import to specification of error No. 2 above, is as follows:

> "1. That the trial court erred in dismissing the within cause on the ground that the officer of the Department of State had never denied appellants' application for entry into the United States, in that appellants' complaint sets forth facts showing that said officer has unfairly, unreasonably and arbitrarily failed to act on their applications, and such failure is tantamount to a denial under Section 903, Title 8, USCA."

QUESTIONS PRESENTED

JURISDICTION

(a) Is it necessary under § 503 of the Nationality Act of 1940, (§ 903, Title 8, USC) to allege *that a right or privilege* as a National of the United States *was claimed* and that *such right or privilege* was denied by Department or Agency or Executive Official thereof *upon the ground that appellants were not Nationals of the United States.*

(b) The following cases consolidated herein brought by the father (or brother) and/or the next friend of said appellants were not brought in accordance with Rule 17(c) of the Federal Rules of Civil Procedure in that said appellants were not minors and the complaints do not contain any allegation of incompetence.

Case No.	Plaintiff	Age when complaint was filed
13963	Chin Chuck Sang	24
14031	Joong Tung Yeau	26
14032	Lee Wing Gue	22
14034	Louie Hoy Gay	44

ARGUMENT

JURISDICTION

(a) The District Court had no jurisdiction of the within actions and the same should be dismissed for the reason that the complaints failed to incorporate the essential jurisdictional allegations of § 503 of the Nationality Act of 1940 (8 USCA § 903), to-wit, they did not allege that as a National of the United States there had been a *denial of a right* or *privilege* by Department, Agency or Executive Official, *on the ground that he is not a National of the United States.*

Paragraphs VII and VIII herein and the pertinent paragraphs of the related cases consolidated herein quoted as Appendices A to E inclusive show on the face of the complaints that the applications for passport had not been finally processed and therefore there had not been a denial of a right or privilege on the ground applicants were not Nationals of the United States, an essential jurisdictional requirement under § 903, Title 8, USCA. This conclusion is clearly supported in *Dulles* v. *Lee Gnan Lung,* 212 F. 2d 73,

75 (C.A. 9). This Court stated as follows:

"To state a claim upon which relief could be granted in an action under § 503 of the Nationality Act of 1940, 8 USCA, § 903, *it was necessary to allege* that the plaintiff in such action had claimed *a right or privilege* as a National of the United States *and had been denied such right or privilege* by a Department or Agency, or Executive Official thereof, *upon the ground that he was not a National of the United States.* The complaint in this action did not so allege.

"The complaint alleged that in February, 1951,[3] Kut caused to be prepared an 'identification affidavit'[4] for the purpose of securing from an American consul in Hong Kong a 'travel document'[5] to enable Lung to travel to the United States, and that the 'identification affidavit' was filed with the consul shortly after its preparation;[6] *but the complaint did not allege that Lung made or filed the 'identification affidavit,' or that he authorized such making or filing. Much less did it allege that Lung had claimed a right or privilege as a national of the United States.*

"The complaint alleged, in substance, that, up to the time the action was instituted—February 19, 1952—the consul had failed and neglected to issue a 'travel document' to Lung; *but it did not allege that Lung had been denied a 'travel document.' Much less did it allege that Lung had been denied a right or privilege as a national of the United States upon the ground that he was not such a national. . .*" (Italics ours) (Footnotes omitted)

See also *Fong Wone Jing* vs. *Dulles,* 217 F. 2d 138, 140 (C.A. 9 Nov. 23, 1954); *Elizarraraz* vs. *Brownell,* 217 F. 2d

829, 830-831 (C.A. 9); *Clark* vs. *Inouye,* 175 F. 2d 740, 742 (C.A. 9, 1949); and *Lee Hung, Lee Siu and Lee Jam* vs. *Acheson,* 103 F. Supp. 35.

In *Dong Chew, et al* vs. *Dulles,* 32093, DC N.D. Cal., decided May 21, 1953, Judge Murphy stated:

> "Invocation of 8 USC 903 is predicated upon allegation that a purported National's rights have been denied on the ground *that he is not a National of the United States.*" (Italics ours)

Appellants contend that the refusal or delay of the Consul to issue a United States passport is tantamount to a denial of a right and privilege of a National on the ground that the person seeking such passport is not a National. The contention is without merit. A passport is *not evidence of citizenship.*

Urtetiqui vs. *D'Arcy,* 34 U.S. 692;
In re Gee Hop, 71 F. 274 (DC N.D. Cal. 1895);
Edsel vs. *Mark,* 179 F. 292 (C.A. 9);
Miller vs. *Sinjen,* 289 F. 388 (C.A. 8) (1923);
Lee Tong Tai vs. *Acheson,* 104 F. Supp. 503 (Ed. Tenn. 1952);
Scott vs. *McGrath,* 104 F. Supp. 267 (E.D. NY. 1905, 1952).

A passport is issued only in the discretion of the Secretary of State, *Perkins* vs. *Elg,* 307 U.S. 325, and is generally directed to a foreign state for the purpose of protecting the holder of the passport. See cases cited above, also *U. S.* vs.

Browder, 312 U.S. 335 (1941). *Miller* vs. *Sinjen,* Supra, was a case in which a United States passport was denied by the Charge d' Affairs, Mexico City. The 8th Circuit said, page 394:

> ". . . *a finding* that *plaintiff* had *ceased* to be a *citizen of the United States was not necessary to action* of the *State Department* in *denying* him a passport for the reason that the granting of a passport by the United States *is* and always has been a *discretionary* matter; and a passport when granted is not conclusive *nor is it even evidence that the person to whom it is granted* is a citizen of the United States. *Urtetiqui* vs. *D'Arcy,* 34 U.S. 692; In re *Gee Hop,* 71 F. 274; *Edsel* vs. *Mark,* 179 F. 292, 23 Op. Atty. Gen. 509." (Italics ours)

In the case *Lee Hung* vs. *Acheson, supra,* the contention was made that an application had been pending with the American Consulate at Canton and later at Hong Kong, for a period of over 6 years, and that plaintiff had been unable to secure a visa, permit or permission to travel to the United States. Also, in *Dulles* vs. *Lee Gnan Lung, supra,* where the complaint alleged in substance that up to the time the action was instituted — February 19, 1952 — the Consul had failed and neglected to issue a "travel document" to Lung. In both of these cases the court held that the complaints should affirmatively show that plaintiffs were denied a right or privilege on the ground that they were not Nationals of the United States. Since these essential jurisdictional allegations were absent from the complaints,

they did not therefore state facts upon which relief could be granted.

For the court in this case to construe the failure of the American Consul at Hong Kong to act, within a period of time which the appellants deem reasonable, a denial of their applications would be merely an assumption based on an argumentative allegation in the complaint, which does not, in any respect, conform to the requirements for a denial set out in the statute. This would be in contradiction of the well-settled principle that there is a presumption against the jurisdiction of a Federal court unless the contrary affirmative appears in the record, and any doubt should be resolved against jurisdiction.

> *Mansfield C. & L. N. Ry. Co.* vs. *Swan,* 111 U.S. 379;
> *In re Smith* vs. *U.S.,* 94 U.S. 455;
> *Baltimore Co.* vs. *Thompson,* 8 F.R.D. 96.

A positive allegation of the facts upon which federal jurisdiction is based must be alleged and jurisdiction cannot be inferred argumentatively from the pleadings.

Hanford vs. *Davis,* 163 U.S. 273. The court, at page 280, said:

> "Essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one the circuit court is entitled to take cognizance."

In support of the proposition that the delay of the Consul General to act on the applications for travel documents is

tantamount to a denial, appellants cite the case of *Look Yun Lin* vs. *Acheson,* 95 F. Supp. 583. In that case, the American Consulate denied the application of Look Yun Lin and he then attempted to have issued to him a certificate of identity and the claim for this certificate was carried to Washington, D. C., after complying with all of the regulatory provisions set up in Title 22, Code of Federal Regulations, particularly 50.28. The Secretary of State having failed to act after a period of 8 months, the court in this case ordered that defendant issue a certificate of identity to plaintiff for the limited purpose of proceeding to the United States in order to testify as a witness in her own behalf at the trial of the pending case. That case was decided by Judge Harris on February 8, 1951. Subsequently and on May 4, 1954, the 9th Circuit in the case of *Dulles* vs. *Lee Gnan Lung, supra,* ruled that the District Court had no jurisdiction to make such an order directing or requiring the issuance of a certificate of identity.

Appellants likewise cite the case of *Lee Bang Hong, et al,* vs. *Acheson,* 110 F. Supp. 48, which holds that an oversight of the American Consul at Hong Kong to process the application of plaintiff before plaintiff's sixteenth birthday, did not divest plaintiff of his United States citizenship by reason of Section 601, Sub-sections (g) and (h) of 8 USCA. Plaintiff having reached the age of sixteen, the American Consulate denied his application upon the ground that he could not take up residence in the United States on or be-

fore his sixteenth birthday. District Judge Metzger, decided that this was a denial of his rights and privileges as a United States citizen. It is submitted that this case is not authority for the proposition that failure to act is tantamount to a denial.

The next case cited by appellants in support of the aforesaid proposition is the case of *Lee Hong* vs. *Acheson,* 110 F. Supp. 60, in which case plaintiff Lee Soon born in China on June 25, 1935, filed an application on January 17, 1951 with the American Consulate General at Hong Kong for documentation which would allow plaintiff to proceed to the United States. The travel document was issued at one o'clock P.M. on June 23, 1951, and within four hours thereafter, plaintiff boarded an aircraft and departed from Hong Kong en route to the United States. The plane was delayed for approximately 22 hours in Tokyo, Japan, because of mechanical failure, and on account thereof, plaintiff did not arrive in Honolulu until June 25, 1951, his sixteenth birthday. The government contended for a literal construction of § 201(g), 8 USCA § 601(g), which required plaintiff's arrival in the United States prior to his sixteenth birthday. Plaintiff then filed an action in that case under 8 USCA Section 903, praying to be adjudicated a United States citizen. The government conceded that plaintiff had acquired the status of a "citizen of the United States" at birth. The court stated that plaintiff, having made a bona fide attempt to take up residence in the United States prior to

attaining his sixteenth birthday, had qualified as one who had made substantial compliance with § 201(g), 8 USCA § 601(g), and was thereafter entitled to be adjudicated a citizen of the United States. In the opinion, Judge Carter said:

> "Denial of sufficient time within which to exercise a right is the same as the denial of the right itself."

This language, the government contends, is inappropriate, since the documentation was issued 37 hours prior to the time that plaintiff would attain the age of sixteen, and normally would have been sufficient time to enable plaintiff to arrive in the United States prior to the attaining of the age of sixteen. The facts show that it was due to other circumstances beyond the control of this plaintiff, that caused his failure to arrive in the United States on time, rather than the failure of the Consul to grant his documentation. Would the court have used the same language if plaintiff had gone down at sea and there rescued by inhabitants of an infrequently visited island and months or years elapsed before he could reach civilization? Must the consul have anticipated that plaintiff's plane would have mechanical trouble in Japan? There being no denial, express or implied, to the issuance of the documentation, and the facts being at great variance to the within cause, it is submitted that this case is not authority for the proposition cited by the appellants herein.

Appellants also cite *Acheson* v. *Yee King Gee,* 184 F. 2d 382, the same being a suit brought by the father for his minor son, under the provisions of § 503 of the Nationality Act of 1940, 8 USCA, § 903. That case called for the interpretation of § 201(g), 8 USCA, § 601(g), which, in so far as is material herein, provides:

> "The following shall be nationals and citizens of the United States at birth: . . .
>
> "(g) A person born outside the United States . . . of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years residence in the United States . . . at least five of which were after attaining the age of sixteen years, the other being an alien: . . ."

The proof showed that the father, over a period of approximately 12 years, resided in the United States for a period of eight years and four months prior to appellee's birth. During this period, the father had made several trips to China and if the time spent abroad were included as part of his residence in this country, then the period of his residence in this country would be nearly twelve years prior to the date of appellee's birth. The court held that the term "resident" as here used, is entitled to a broad and liberal construction. This case has no application to the within cause.

The case of *Nuspel* vs. *Clark,* 83 F. Supp. 963 is also cited as supporting the aforementioned contention of appellants. In this case the court in part held as follows:

> "... The unreasonable delay in granting the application for an immigration visa for the wife of the plaintiff constitutes a denial of a right or privilege of a National upon the ground that he is not a National ..."

In this case plaintiff's wife was residing in Hungary and the plaintiff was residing in the United States, he having previously been naturalized as a citizen of this country, and subsequent to his being naturalized he spent some time in Hungary, but having returned to the United States his citizenship was challenged. The foreign consul in Hungary was holding in abeyance the issuance of the visa to plaintiff's wife pending the ultimate determination of plaintiff's status as a citizen. Plaintiff had been arrested on a warrant charging him with illegal entry into the United States; thereafter hearings were had before an inspector of the United States Department of Justice, Bureau of Immigration and Naturalization, with the object in view of deporting him. The court held that the plaintiff was a citizen of the United States. The above quotation seems very remote to the issues involved since it was the visa to plaintiff's wife that was being held up, and if anyone's right or privilege was being violated, it would be plaintiff's wife rather than plaintiff. It is urged that this case is little if any support for the contention of appellants herein.

It has been brought out in other cases considered by the Ninth Circuit Court of Appeals that the American Consul

at Hong Kong had been literally deluged with applications to come to the United States by persons who claimed they had fathers who were American citizens. As the effective date of the Immigration and Nationality Act of 1952, Public Law 414, approached, the filing of applications greatly increased in number and obviously the Consul had no means of knowing anything about these persons. The Consul would certainly not grant documentation without having evidence as to the truthfulness of the claim of the applicants and he therefore declined to act pending receipt of such information. The within suits were then filed incorporating the allegation that the American Consul had failed and refused to grant the documentation. It has been reported that there were at least 1800 applications pending before the Consul prior to the effective date of the 1952 Nationality Act, and surely it was a physical impossibility to have acted upon all applications before the new act became operative.

In line with the foregoing statements, the case of *Ling Share Yee, et al* v. *Acheson,* 214 F. 2d 4, is in point. There, the minor plaintiff applied to the American Consul at Hong Kong, for travel documents but action thereon by the consul was withheld, pending the production of new and additional evidence. The action was filed without the consul having denied plaintiffs' application. The District Court concluded that the delay in acting upon the application by the American Consul did not amount to a denial, since the delay was attributable to neglect of plaintiffs to furnish additional

evidence. The court of appeals affirmed the ruling of the lower court. A somewhat similar situation prevailed in Hong Kong prior to the effective date of the 1952 Nationality Act, in that the American Consul, being deluged with applications, had not had the opportunity to pass upon the bulk of the filed applications.

In appellant's brief, counsel has cited numerous cases and has given considerable space to the discussion of the considerations pertaining to the sufficiency of a complaint when challenged by a defendant's motion to dismiss. Several cases are cited to show the inferences and legal conclusions that may reasonably issue in favor of claimed validity and sufficiency of a complaint. Generally, we have no quarrel with these general principles of law, and therefore it is not believed necessary to discuss these many cases cited by appellant.

It is, of course, fundamental that suits against the United States may be maintained only by permission, in the manner described in the consent statute, and the liability of the United States to suit cannot be extended beyond the plain language of the statute authorizing it. *Monroe* v. *U. S.,* 303 U.S. 36, 41; *Eastern Trans. Co.* v. *U. S.,* 272 U.S. 675, 678; *Reid* v. *U. S.,* 211 U.S. 529, 538. It is submitted that the complaints herein do not meet this test.

(b) The following cases consolidated herein brought by the father (or brother) and/or the next

friend of said appellants were not brought in accordance with Rule 17(c) of the Federal Rules of Civil Procedure in that said appellants were not minors and the complaints do not contain any allegation of incompetence.

Case No.	Plaintiff	Age when complaint was filed
13963	Chin Chuck Sang	24
14031	Joong Tung Yeau	26
14032	Lee Wing Gue	22
14034	Louie Hoy Gay	44

The Ninth Circuit in the case of *Dulles* vs. *Lee Gnan Lung,* supra, said that suit through a next friend is authorized, under Rule 17(c) Federal Rules of Civil Procedure, only if the plaintiff is an infant or otherwise incompetent. According to the pleadings in that case, Louie Hoy Gay, Joong Tung Yeau, and Chin Chuck Sang had each reached his majority before his action was instituted, and there is no allegation that either was incompetent. The *Lung* opinion does not specifically rule on the question whether such a defect is considered fatal, but the following quotation (p. 75) indicates that the Court of Appeals believed that it was:

> "Section 503 of the Nationality Act of 1940, 8 USCA § 903, did not give any court jurisdiction of any action other than an *action instituted by a person who*

had claimed a right or privilege as a national of the United States and has been denied such right or privilege by a Department or agency, or executive official thereof, upon the ground that he was not a national of the United States. This action does not appear to have been so instituted." (Italics ours)

The aforementioned appellants, at the time the complaints were filed, had attained the ages as aforesaid, and in none of the cases did the pleadings contain an allegation that the said appellants were incompetent. As to these appellants, it is contended that the actions brought by the father and/or next friend of these individuals were not authorized and their complaints should accordingly be dismissed.

CONCLUSION

It has been clearly shown herein that the essential jurisdictional allegations have been omitted from each and all of appellants' complaints herein. There is therefore no basis upon which the lower court can grant the relief prayed for. It is submitted that the determination of the lower court must be sustained.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney
for the District of Oregon

VICTOR E. HARR,
Assistant United States Attorney
Of Attorneys for Appellee

APPENDIX A

COMPLAINT No. 13963

CHIN CHUCK MING and CHIN CHUCK SANG, by their next friend and father CHIN AH POY, Plaintiffs,

vs.

DEAN ACHESON, Secretary of State of the United States of America, Defendant.

"IX. That Chin Ah Poy caused to be filed with the American Consul General at Hongkong his affidavit-application dated September 6, 1951, prepared in accordance with the regulations, for travel documents for the said Chin Chuck Ming and Chin Chuck Sang so that they would be eligible to purchase transportation to the United States in order to apply for admission as citizens thereof at a port of entry under the immigration laws.

"X. That although the plaintiffs have been steadily available for examination by the American Consul General at Hongkong, he has not issued the requested travel documents; that the failure of the said Consul General to issue the documents after a lapse of so much time is unfair, unreasonable, arbitrary and is equivalent to a denial of the plaintiffs' applications and their rights as American citizens; that the plaintiffs thereby have been stopped from coming to the United States and from applying to and presenting proof of their American citizenship to the Immigration Service at a port of entry; that since the Consul General has not denied the said applications there has been no official denial and therefore the defendant would, as could

be expected, refuse to take cognizance of any appeal, as under Section 50.28 of Title 22, Code of Federal Regulations, leaving the only available remedy the present action."

APPENDIX B

COMPLAINT No. 14031

JOONG TUNG YEAU, by his brother and next friend, JOONG YUEN HING, Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America, Defendant.

"VII. That during August, 1947, plaintiff's brothers, Joong Yuen Hing and Joong Bock Foon caused to be prepared an identification affidavit, stating their relationship to this plainitff and that the said affidavit was prepared as an application for the purpose of obtaining from the American Consulate at Canton, China, a passport or travel document to enable the plaintiff to purchase transportation to the United States, and that the said identification affidavit was forwarded on August 20, 1947 and was received by the said Consulate at Canton, China in due course, so that the plaintiff could apply for admission under the Immigration Laws at a port of entry in the United States; that because of the closing of the American Consulate at Canton, China in 1949, the identification affidavit aforesaid was forwarded and was received by the American Consulate General at Hong Kong for consideration and action. That although the plaintiff has been interviewed by the said American Consulate at Hong Kong, no action has been taken by the said

Consulate concerning the issuance of a passport or travel document and the plaintiff believes and therefore alleges that the said American Consulate has no intention of issuing to plaintiff a passport or travel document, and that the said American Consulate's failure to issue such passport or travel document constitutes an unreasonable and unfair delay and a denial of plaintiff's rights as an American Citizen, and plaintiff has been thereby denied from coming to the United States and from applying and presenting the proof of his Citizenship to the Immigration and Naturalization Service at a port of entry; that since the said American Consulate has refused to take any action as aforesaid, there has been no official denial of the plaintiff's petition by the said American Consulate and, therefore, the defendant did and has refused to take cognizance of any appeal, and that the said American Consulate by their delaying tactics has prevented the plaintiff from taking any action by appeal or otherwise, and the plaintiff's only remedy is under Section 503 of the Nationality Act of 1940 for the reason that he can obtain no relief whatsoever from the said American Consulate."

APPENDIX C

COMPLAINT No. 14032

LEE WING GUE, by his father and next friend, LEE SUN YUE, Plaintiff,

vs.

DEAN ACHESON, Secretary of State of the United States of America, Defendant.

"VIII. That during October, 1948, plaintiff's father, Lee Sun Yue, caused to be prepared and filed

with the American Consul General at Canton, China an application for the issuance of a passport or travel document as provided for by the regulations of the Department of State so that the plaintiff would be eligible to purchase transportation to the United States in order to apply for admission as a citizen thereof under the Immigration Laws; that said application and affidavit was forwarded by Air Mail on October 20, 1948 and filed at the American Consul General's office on or about October 26, 1948 so that the plaintiff could apply for admission under the Immigration Laws at a port of entry in the United States; that because the American Consulate at Canton was closed in 1949, the affidavit and application aforesaid was forwarded to the American Consulate at Hong Kong for consideration and action.

"That although plaintiff has been interviewed by the American Consulate at Hong Kong, no action has been taken by said Consulate concerning the issuance of a passport or travel document and the plaintiff believes and therefore alleges that the said American Consulate at Hong Kong has no intention of issuing to plaintiff a passport, and that the said American Consulate's failure to issue such passport or travel document constitutes an unreasonable and unfair delay and a denial to plaintiff of his right as an American Citizen from coming to the United States and from applying to and presenting to the Immigration and Naturalization Service at a port of entry in the United States proof of his American nationality and citizenship; that since the Consul has refused to take any action as aforesaid, there has been no official denial of plaintiff's petition and affidavit by the said Consul and, therefore, the Secretary of State has refused to take cogni-

zance of any appeal and that the said American Consulate by their delaying tactics has prevented the plaintiff from taking any action by appeal or otherwise and the plaintiff's only remedy is under Section 503 of the Nationality Act of 1940."

APPENDIX D

COMPLAINT No. 14034

LOUIE HOY GAY, by his father and next friend, LOUIE FOO, Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America, Defendant.

"VIII. That said Louis Foo caused to be filed with the American Consul General at Hong Kong, China, a written application for the issuance of a Passport or Travel Document in July, 1952, as provided for by the regulations of the Department of State, so that the plaintiff, Louie Hoy Gay, would be eligible to purchase transportation to the United States in order to apply for admission as a Citizen thereof under the Immigration Laws; that said application was returned to said Louie Foo, father of Louie Hoy Gay, by the American Consul at Hong Kong, China, under date of August 15, 1952, with a request by said American Consul to file a new affidavit and/or application, prepared in accordance with an information sheet enclosed therewith.

"That in pursuance of said foregoing request, said Louie Foo, in behalf of his said son, Louie Hoy Gay,

transmitted to the American Consul at Hong Kong, China, as requested by him, under date of October 24, 1952, another application, including therein all of the additional information requested by said American Consul, and said American Consul received the same on November 3, 1952, and said application contained all of the information provided for by the regulations of the Department of State so that plaintiff, Louie Hoy Gay, would be eligible to purchase transportation to the United States in order to apply for admission as a Citizen thereof under said Immigration Laws.

"IX. That although the plaintiff, Louie Hoy Gay, has been interviewed by the said American Consul at Hong Kong, with respect to said applications, no action has been taken by the said American Consul concerning the issuance of Passport or Travel Documents to said Louie Hoy Gay, and the plaintiff believes and therefore alleges that said American Consul has no intention of issuing to plaintiff, Louie Hoy Gay, Passports or Travel Documents and that said American Consul's failure to issue such Passports or Travel Documents constitutes an unreasonable and unfair delay and a denial of plaintiff, Louie Hoy Gay's rights as an American Citizen and plaintiff, Louie Hoy Gay, has been thereby denied the right to come to the United States and apply and present the proof of his Citizenship to the Immigration and Naturalization Service at a port of entry in the United States; that since the said American Consul has refused to take any action as aforesaid, there has been no official denial of the plaintiff's petition by the said American Consul and, therefore, the defendant did and has refused to take cognizance of any appeal, and that the said American Consul, by his delaying tactics, has prevented the plaintiff,

Louie Hoy Gay, from taking any action, by appeal or otherwise, and the plaintiff's only remedy is under and by virtue of Section 503 of the Nationality Act of 1940, for the reason that said plaintiff, Louie Hoy Gay, can obtain no relief whatsoever from said American Consulate in the premises."

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United States
COURT OF APPEALS
for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by their Father and Next Friend, LEE BEN KOON,
Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the United States,
Appellee.

REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the District of Oregon.

RODNEY W. BANKS,
Public Service Building,
Portland, Oregon,
JOSEPH & POWERS,
Yeon Building,
Portland, Oregon,
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-55

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REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the District of Oregon.

The appeals in this case and consolidated cases Nos. 13963, 14031, 14032, 14033, and 14034 are based upon Section 503 of the Nationality Act of 1940 (8 U.S.C.A. §903), involving the rights of the appellants to enter the United States from a foreign country and have said rights determined by a Federal Court pursuant to the provisions thereof, including Chinese born in China

whose fathers are citizens and nationals of the United States.

These appeals were grounded upon four specifications of error as set forth in appellants' brief, to-wit:

Specifications No. 1, 2, 3 and 4.

Appellee now concedes that all of said specifications of error are correct and unchallenged excepting only specification number two (Appellee's Brief, page 4). We quote from page four of appellee's brief as follows:

> "The issues set forth in specifications 1, 3 and 4 have been disposed of in cases decided subsequent to the orders of dismissal entered in the within causes and the correctness of these specifications of error is admitted."

The foregoing concession by appellee is no doubt the result of the decisions of this Court and others rendered since the filing of these appeals, viz.

Acheson vs. Furosho, 212 Fed. (2d) 284.
Fong Wone Jing vs. Dulles, 217 Fed. (2d) 138.
Brownell vs. Lee Mon Hong, 217 Fed. (2d) 143.
Chow Sing vs. Brownell, 217 Fed. (2d) 140.
Lee Wing Hong vs. Dulles (7th Circ.), 214 Fed. (2d) 753.

The one and only specification of error challenged by appellee is set forth on page four of appellee's brief and is as follows:

> "That the trial Court erred in dismissing the within cause on the ground that the Department of State, through its Consulate Officer has never denied appellant's application for entry into the United States."

In appellee's statement of the case, page three thereof avers:

> "That defendant filed its answer to plaintiff's complaint and for lack of information denied all of the allegations contained in the foregoing paragraphs VII and VIII."

Paragraph IV of appellee's answer is as follows:

> "Answering Paragraphs IV, V, VI, VII, VIII, IX and X; defendant lacks information as to the truth or falsity of the allegations therein contained, and therefore, denies the same and puts plaintiff to proof thereon."

Where the facts are within the defendant's own knowledge or are accessible to him by consulting his records a sham denial of "no knowledge, information or belief" is not filed in good faith, is palpably untrue, is frivolous and insufficient to raise any genuine issue of fact.

Rule 8 (b) of the Federal Rule of Civil Procedure 28 U.S.C.A. Sub-section (d), also Subsection (b) thereof.

Oregon Mesabi Corp. vs. Johnson Lumber Corp., 166 Fed. (2d) 997, 1001 (CA 9, 1947), Cert. Den. 334 U.S. 837.

Lloyd Sabaubo Societa Anonime Per Azioni vs. Elting 47 Fed. (2d) 315.

Refusal to discluse or admit administrative repection of a claim of United States nationality defeats the statutory remedy.

Obviously the appellee, Secretary of State, may not disclaim knowledge or information as to whether his own subordinate, the Consul General at Hong Kong,

had filed with him appellants' applications for travel documents or passports, had conducted preliminary hearings of appellants or had refused and denied said appellants' applications.

As heretofore mentioned and alleged in appellee's answer, he puts us to proof of these matters which up to the present time appellants have been denied the privilege of so doing.

QUESTIONS PRESENTED IN APPELLEE'S BRIEF (Page 5)

(a) Is it necessary under § 503 of the Nationality Act of 1940, (§ 903, Title 8, USC) to allege that a right or privilege as a National of the United States was claimed and that right or privilege was denied by Department or Agency or Executive Official there of upon the ground that appellants were not Nationals of the United States.

ARGUMENT

Appellants submit they have fully covered this matter in their opening brief. The District Court's Order of Dismissal in this and consolidated cases (excepting Lee Wing Gue et al. vs. Acheson, No. 14032) Tr. page 17 with regard to denial states:

> "1. That the application as made to the American Consulate Officer of the Department of State by plaintiffs to permit plaintiff's entry into the United States has never been denied plaintiffs."

In case No. 14032, Lee Wing Gue et al. vs. Acheson, above referred to, the order dismissing this case makes

no mention that the complaint was dismissed for the reason that plaintiff was never denied a right or privilege of a United States national but in fact was dismissed on the three grounds that appellee has heretofore conceded as being incorrect.

Judge James Alger Fee, in his memorandum opinion regarding all of these cases (Tr. page 15) dismissed these cases on the sole ground that substitution of defendant Dulles for Acheson could not be made regardless of timely motions having been made, viz:

> "In view of the fact that substitution cannot be made the Court dismisses each of these cases."

Nowhere in the order dismissing these complaints (Tr. page 11) or the Court's written memorandum opinion (Tr. page 14) is it mentioned that the denial of the passport or travel document as alleged by facts contained in appellants' complaint, was denied on the ground and for the reason that appellants were not nationals.

Appellee does not contend that appellants failed to claim a right or privilege and a reading of Paragraph VI of appellants' complaint and similar allegations made in all consolidated cases plainly states that plaintiffs have alleged that they are citizens and *claim a right to enter the United States as nationals and/or citizens.* Appellants allege in Paragraphs VII and VIII that there has been *refusal* and *denial* by the Consul of their *rights* as American citizens and set forth the *facts* supporting the refusal and denial. Appellants also allege in Paragraph X of their complaint that they claim U. S. nationality

and citizenship in good faith and on a substantial basis. All appellants, in their complaints, claim deritive citizenship under Section 1993 of the Revised Statutes 8 USC 6 First Edition.

Counsel for appellee cites as authority the case of Dulles vs. Lee Gnan Lung, 212 Fed. (2) 73 as being similar to this action and consolidated causes. In the case there was no allegation in the complaint that Lung had *claimed* a *right* or privilege as a national of the United States *nor* did it allege that Lung had been *denied* a right or privilege. Appellee also cites the case of Fong Wone Jing vs. Dulles, 217 Fed. (2) 138. In that case the Court held that the District Court had jurisdiction to entertain the complaint which was tried on the facts as alleged. Appellee also cites Elizarrarez vs. Brownell, 217 Fed. (2d) 829. In that case the complaint contained *no* allegation that plaintiff was denied any right or privilege as a national and consequently did not state a cause of action. Appellee also cites Clark vs. Inouye, 175 Fed. (2d) 740. In this case there were no facts pleaded to show a denial had been made by the Consul and only conclusions of law were alleged. Appellee also cites the case of Lee Hung, Lee Siu and Lee Jam vs. Acheson, 103 Fed. Supp. 35. In those cases plaintiffs did not allege a claim as citizens or that a denial was made. This case came up on motions to dismiss before trial and the Appellant Court gave plaintiffs the opportunity to amend.

It is appellants' contention that under the facts as alleged in the complaint there is a justiciable issue pres-

ent, according to the facts as alleged in appellants' complaint, and that the failure of the Consul to act upon appellants' application amounts to a denial of appellants' rights on the ground that they are not nationals. In Wong Ark Kit vs. Dulles, 127 Fed. Supp. 871 decided January 26, 1955 by the United States District Court, District of Massachusetts the petitioner had applied for United States passport and the United States Consul requested appearance of petitioner's mother to testify as to his nationality. The Consul was informed that the mother could not be produced and the Consul refused to conclude the case. The court held that it was an implied denial of petitioner's passport and petitioner could bring his action declaring him to be a national of the United States.

In the case of Ow Yeon Yung vs. Dulles decided December 4, 1953 by the United States District Court N.D. California S.D. 116 Fed. Supp. 766 the plaintiff testified at his trial that his application for passport had been filed with the Consul and that he had answered their questions at the hearing to the best of his ability. The records of the Consulate Office introduced into evidence at the trial showed that the passport had been refused because plaintiff failed to sufficiently identify himself as the son of an American citizen. Defendant contended that an individual invoking (8 U. S. C. A. Sec. 903) must be denied some right or privilege as a national of the United States *upon the ground that he was not a national of the United States.* The court, in its holdings said:

> "In the case of Wong Wing Foo vs. McGrath (9th Circ. 196 Fed. (2) 120, 122) that this type of action

need not follow any administrative proceedings but could be instituted where an administrative agency such as the Department of State *refuses to give a passport* or refuses to allow a person claiming American citizenship to come to the country."

The court further said:

"That the defendant cites the case of Fong Nai Sun vs. Dulles, DC SD 117 Fed. Supp. 391, to show that the denial of the travel document may be based on grounds other than that the applicant is not a national. The court in that case said that the refusal by the Consul to issue the passport to the applicant was not based on the ground that he was not a national where the applicant failed to supply all the information required, i.e. an identifying witness. In this case there was a lack of essential part of the evidence necessary to make a finding as to nationality."

The court further said:

"That the instant case is distinguished from this above mentioned case in that the Consul had all the prerequisite information required for the issuance of a passport, therefore, the Consul's finding that the proof afforded by plaintiff was insufficient is in effect a finding that the applicant was not a national. As a result, plaintiff was denied a right or privilege on the ground that he was not a national of the United States."

In the case of Quong Ngeung vs. Dulles, U. S. Dist. Court SD New York, 117 Fed. (2d) 498 the complaint alleged that plaintiff had applied for travel documents as a citizen of the United States and that said documents had been refused. Under these set of facts the court stated that there was cause of action against the Secretary of State for declaratory judgment that plaintiff was a

citizen of the United States. This case cited U. S. Federal Rules of Civil Procedure, Rule 12 (b) 6, 28 USCA. The court in passing said:

> "This complaint is different than those in Lee Hung et al. vs. Acheson, 103 Fed. Supp. 35, 37 because in that case the complaint stated that the visa was denied *for reasons unknown to plaintiff*. In the case at bar it clearly states that plaintiff applied for travel documents, as a citizen, which was *refused*. Thus, the instant case is unlike the Lee Hung vs. Acheson and pleads a claim against the Secretary of State sufficient to survive the attack. Whether that claim can be proven is a matter that must await trial."

Counsel for appellee in their brief mentioned that it would be impossible for the Consul to act on appellants' applications before the effective date of the Immigration and Nationality Act of 1952. That there is nothing in the law to prohibit the Department from acting upon each of these cases since the complaints were filed by appellants in 1952. Counsel for appellee on page 16 of their brief state:

> "It has been reported that there were at least 1800 applications pending before the Consul prior to the effective date of the 1952 Nationality Act, and surely it was a physical impossibility to have acted upon all applications before the new act became operative."

This language seems to submit to the court matters of expediency. Since when have matters of expediency become parmount to the legal rights of the appellants? It is submitted that the Consul had from six months to five years to act in these cases. That to this date, no action has been taken on appellants' applications with

the exception of one, to-wit: Lee Wing Gue, No. 14032, in which case the Consul has made an official denial by way of a letter to the applicant and a letter to his attorney which were received by appellants' attorney after Judge Fee's order dismissing this case copies of which letters are set forth in a special appendix attached hereto. That it is the earnest desire of the said appellant that this Court consider said rights in this particular case.

Counsel for appellee cites a number of cases to point out that a passport is not evidence of citizenship and appellants have no quarrel with this proposition and fail to see wherein this contention has anything to do with these cases.

Counsel for appellee on page 16 of their brief cite the case of Ling Share Yee vs. Acheson, 214 Fed. (2d) 4, as being in point with their contention that the consul was not dilatory in his actions and therefore it did not amount to a denial. In that particular case, the consul withheld travel documents pending the plaintiff submitting further evidence which was not done by the plaintiff and, of course, it was reasonable to assume that the plaintiff could not claim denial for failure of the consul to act when in fact there was something to be done by the plaintiff. In appellants' cases all applicants filed with the consul their applicantions for passport in order to come to the United States to have their claims for citizenship determined but since the time of their filing of their said applications and hearings with the consul, the consul has refused and neglected to recognize, in any particular, said appellants' applications ex-

cept as cited above in the case of Lee Wing Gue, No. 14032, one of the appellants.

Appellee states in this brief that he has "no quarrel" with appellants' citations and contentions made in appellants' brief to the sufficiency of complaints under challenge by motions to dismiss. Appellants contend by virtue of said decisions that these cases should be remanded to the District Court for trial.

If counsel for appellee's contention is tenable why did he consent to a removal of the case of Woo Chin Chew et al. vs. Acheson, No. 14030, from this court to the District Court for further proceedings?

> "(b) The following cases consolidated herein brought by the father (or brother) and/or the next friend of said appellants were not brought in accordance with Rule 17 (c) of the Federal Rules of Civil Procedure in that appellants were not minors and the complaints do not contain any allegation of incompetence."

ARGUMENT

Appellee has failed to point out the facts to this Court that in the case of Chin Chuck Ming and Chin Chuck Sang et al. vs. Dulles, No. 13963, appellant Chin Chuck Ming was born on January 13, 1933 and his action was filed December 22, 1952 and that in the case of Lee Gwain Toy and Lee Gwain Dok et al. vs. Acheson, No. 14033, the entitled appellants herein were minors at the time of filing their complaint herein, Lee Gwain Toy being born on March 14, 1934 and Lee Gwain Dok being born December 12, 1932 and their action having been filed December 19, 1952.

Appellants contend that this question is not one of jurisdiction, and that the filing of actions by next friend does not in and of itself deny the court the power of jurisdiction to determine factual issues. Has not the court the authority to disregard and exclude "next friend"? The necessary allegations pertaining to the son, if proven on trial thereof, can determine their rights as citizens. This contention of appellee should have been raised, if at all, upon motion to dismiss in the District Court.

> "Objections that plaintiff is not the real party in interest must be made with reasonable promptness."
>
> Clark vs. Chase National Bank of City of New York, 45 Fed. Supp. 820.

> "Misjoinder of parties does not authorize dismissal of an action but such parties may be dropped out at any stage of the proceedings."
>
> F. X. Hooper Co. v. Langstan, 56 Fed. Supp 577.

> "Misjoinder of parties is not a ground for dismissal of an action. Parties may be dropped or added by order of the court upon motion of any party or of its own initiative at any stage of the action and on such terms as are just."
>
> Rule 21, Rules of Civil Procedure.

> "Under the rule, misjoinder of plaintiffs is not a ground for dismissal, and therefore not a defense."
>
> Macloud vs. Cohen Co., 28 Fed. Supp. 103.

> "Misjoinder is no longer a ground for dismissal."
>
> Vante vs. United States, 7 FDR 705 and 51 Fed. Supp. 500.

CONCLUSION

Appellants restate that they have met all requirements of Section 503 of the Nationality Act of 1940, 8

U.S.C.A. Sec. 903 and that the District Court has jurisdiction to try the issues and determine appellants' claims for United States national status and have substantially compiled with Rule 17(c) Federal Rules of Civil Procedure.

Can it be said that the Consul did not deny appellants' applications on the ground that they are not nationals of the United States when it appears from the complaints that the appellants' applications were filed with the Consul from five months to five years with preliminary hearings had before the Consul and since that time the Consul has remained mute? How long should appellants be required to wait for action by the Consul? Certainly it can be said that the Consul, if they intended to act upon appellants' applications, would or should have acted by now. It leads one to no other conclusion but that appellants' applications have been abandoned and there is no other way to protect their rights as American citizens than to have their case tried upon the facts and merits presented in their complaints before the District Court for the District of Oregon.

It is respectfully submitted that under the statute and pleadings herein, appellants are entitled to their day in court and reversal of the District Court's order dismissing these cases is in order.

Respectfully submitted

Rodney W. Banks,
Joseph & Powers,
Attorneys of appellants.

APPENDIX

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

American Consulate General
Hong Kong, April 14, 1953

Lee Wing Gue,
91 Wing Lok Street,
2nd Floor,
Hong Kong.

Dear Sir:

With reference to this office's letter of February 20, 1953, please be advised that a communication has been received from the Department of State informing this office that your passport application has been disapproved.

Very truly yours,

For the Consul General:
JOHN A. MCVICKAR,
American Vice Consul

Address Official Communications to
THE SECRETARY OF STATE
Washington 25, D. C.

DEPARTMENT OF STATE

Washington

In reply refer to
F130-Lee Wing Gue

Banks and Banks,
1208 Public Service Building,
Portland 4, Oregon.

My dear Mr. Banks:

In reply to your letter of April 22, 1953, you are informed that the passport application executed at the American Consulate General in Hong Kong on July 30, 1951 by Lee Wing Gue was disapproved by the Department of State because the applicant was unable to establish his identity. The material enclosed with your letter is of little value in determining the question of identity since it appears to have been created after Lee Sun Yue decided to bring his alleged fourth son to this country. You are further informed that the file in this case has been forwarded to the United States Attorney in connection with Civil Action No. 6752.

Sincerely yours,

R. B. SHIPLEY,
Director, Passport Office.